

## COPYRIGHT ARBITRATION ROYALTY PANEL

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HEARING

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In the Matter of:

Adjustment of the Rates for  
Noncommercial Educational  
Broadcasting Compulsory  
License

Docket No. 96-6  
CARP NCBRA

Library of Congress  
James Madison Building  
101 Independence Avenue, S.E.  
Room LM414  
Washington, D.C. 20540

Wednesday,  
May 6, 1998

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson  
THE HONORABLE EDWARD DREYFUS  
THE HONORABLE JEFFREY S. GULIN

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## C-O-N-T-E-N-T-S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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**Marvin Berenson**

By Mr. Kleinberg	3380			
By Mr. Schaeffer		3405		
By Mr. Rich		3409		

**Bruce Owen**

By Mr. Salzman	3552			
By Mr. Rich		3560		

**Paula Jameson**

By Mr. Rich	3565			
By Mr. Schaeffer		3575		
By Mr. Kleinberg		3601		

<u>Exhibits</u>	<u>Description</u>	<u>Mark</u>	<u>Recd</u>
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Public Broadcasters

30X	Minutes	3414	3462
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BMI

4	Recalculation	3556	3560
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ASCAP

32X	Black's Law Dictionary	3596	3597
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P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

CHAIRPERSON GRIFFITH: Ladies and gentlemen good morning.

All right, let the record reflect please that the reporter has been previously sworn and remains under oath.

Mr. Kleinberg, you seem to have taken the front row seat --

MR. KLEINBERG: I have indeed.

CHAIRPERSON GRIFFITH: -- this morning. So --

MR. KLEINBERG: We are ready. Any preliminaries that the panel wants to address?

CHAIRPERSON GRIFFITH: Wait just one minute. Oh yes --

JUDGE GULIN: May we inquire as to the status of the --

CHAIRPERSON GRIFFITH: -- two things.

JUDGE GULIN: -- motion to compel that ASCAP filed with respect to public --

MR. SCHAEFFER: That has been resolved.

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1 JUDGE GULIN: That has been resolved?

2 MR. SCHAEFFER: That has been resolved.

3 JUDGE GULIN: Okay.

4 CHAIRPERSON GRIFFITH: All right. So you  
5 are withdrawing that then, Mr. Schaeffer and we will  
6 enter an order to that effect. We'll save the  
7 opposing argument thing for Friday.

8 Mr. Kleinberg we are ready sir.

9 MR. KLEINBERG: Okay. BMI calls as its  
10 first witness in its rebuttal case Marvin Berenson.  
11 WHEREUPON,

12 MARVIN L. BERENSON  
13 was called by Counsel for Broadcast Music, Inc. and,  
14 having been first duly sworn, assumed the witness  
15 stand, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KLEINBERG:

18 Q Mr. Berenson, would you state your full  
19 name for the record please?

20 A Marvin L. Berenson, B-E-R-E-N-S-O-N.

21 Q Mr. Berenson, what's your current  
22 occupation?

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1           A       I am an attorney.     I'm Senior Vice  
2       President and General Counsel of Broadcast Music  
3       company, referred to as BMI.

4           Q       And how long have you been employed at  
5       BMI?

6           A       I've been employed at BMI since April  
7       1976.

8           Q       Now the Panel has had the benefit of your  
9       written testimony and we are going to go through some  
10      of that. Would you tell the Panel, Mr. Berenson, were  
11      you involved in any of the negotiations that took  
12      place between BMI and the Public Broadcasters with  
13      respect to the 1993/1997 license and the 1998/1992  
14      licenses?

15          A       Yes, before I do that I'd just like to  
16      make one correction in my testimony.

17          Q       Yes.

18          A       On page one, I said I graduated from  
19      Boston University School of Law, 1963. I'm not that  
20      old. It was 1966 rather than 1963. Can I have the  
21      question -- can you rephrase the question?

22          Q       Certainly. Were you involved in any of

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1 the negotiations that took place between BMI and the  
2 Public Broadcasters with respect to the license  
3 agreements entered into by those parties for the  
4 period 1988 to 1992 and 1993 to 1997?

5 A Yes I was. I was basically the negotiator  
6 on behalf of BMI.

7 Q I want to focus your attention, Mr.  
8 Berenson, on the 1992 negotiations which dealt with  
9 the license period 1993 to 1997. Could you tell me  
10 with whom you negotiated on the Public Broadcasters'  
11 side?

12 A Primarily it was Paula Jameson who was the  
13 General Counsel of PBS at the time. There were others  
14 that would come and go, but primarily it was Paula  
15 Jameson.

16 Q And in your written testimony, you  
17 indicated that during the 1992 negotiations, you  
18 pointed out to Ms. Jameson the fact that BMI had  
19 received complaints from commercial television and  
20 radio broadcasters about Public Broadcasting and its  
21 licensing arrangement. Could you tell the Panel what  
22 you were referring to when you talked about that in

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1 your written testimony?

2 A Yes, what would happen is on occasion I  
3 would receive calls and on occasion meet with  
4 commercial broadcasters and they would relate their  
5 frustration to some extent as to what was happening  
6 with respect to their station vis a vis the public  
7 broadcasting systems. Their complaint was basically  
8 that on one hand the commercial broadcasters were  
9 paying higher fees than PBS stations. In a sense they  
10 were saying that PBS stations were underpaying.

11 The reasons for this, they expressed, were  
12 for the following reasons. Number one, they felt that  
13 there had been a convergence to some extent of the  
14 programming that was on PBS as compared to commercial  
15 stations. There had been also with respect to  
16 advertising as they would call it -- I guess PBS calls  
17 it underwriting of subscriptions. But the ads that  
18 were being seen and heard on the public broadcasting  
19 and NPR stations were more than just the usual what  
20 had been on the end of the PBS programs, a blue field  
21 with this program has been presented by a grant  
22 through McDonald's Corporation, or something of the

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1 sort.

2 They were more commercial in nature. And  
3 they felt that the ads, as they described them, that  
4 were on the PBS stations were taking away revenues  
5 from their stations. And they felt that under the  
6 circumstances PBS stations and NPR stations should be  
7 paying their fair share to the societies.

8 MR. RICH: May I note my objection to the  
9 witnesses' response to the extent it would purport to  
10 come in for the truth of these third party assertions  
11 as opposed for the fact that these statements were  
12 made, since they are classic hearsay.

13 CHAIRPERSON GRIFFITH: I think he is  
14 simply saying what they told him. That's correct,  
15 isn't it?

16 THE WITNESS: I was asked -- I was -- yes.  
17 About these conversations, yes.

18 CHAIRPERSON GRIFFITH: All right. Go  
19 ahead.

20 BY MR. KLEINBERG:

21 Q And did you convey any of these sentiments  
22 to Ms. Jameson or any other public broadcaster

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1 representatives during the negotiations regarding the  
2 1992 or 1993 license period?

3 A Yes I did.

4 Q And what response, if any, did Ms. Jameson  
5 or any of the other public broadcasters make with  
6 respect to any of those items?

7 A Well with respect to the -- let me refer  
8 to some advertising. I don't want to get confused  
9 between advertising and subscription or advertising  
10 and whatever PBS calls it.

11 Paula said that there were guidelines  
12 which the PBS stations and the NPR stations had to  
13 follow with respect to the advertising or  
14 subscriptions, underwriting. And that while PBS had  
15 control over what they produced, they program that  
16 they produced and the ads that were inserted in their  
17 programs, or surrounded their programming, I should  
18 say, what was done locally they had very little  
19 control.

20 And when they stepped over the line or  
21 came close to the line, and public broadcasting was  
22 made aware of this, they would contact the station and

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1 say hey, you have crossed over the line. You are  
2 right at the line. Be careful. You should not be  
3 doing that.

4 Q Now Mr. Berenson, were there any  
5 discussions during your negotiations in 1992 with  
6 respect to the question of the source of funding that  
7 the public broadcasters had with respect to paying BMI  
8 music license fees?

9 A Yes.

10 Q Tell the Panel what those discussions  
11 were.

12 A Basically I related to Ms. Jameson that in  
13 my opinion, on behalf of BMI, public broadcasters  
14 should be paying more to BMI for the music usage, the  
15 use of BMI music. And Paula basically related to me  
16 that there was -- I think she referred to it as a six  
17 percent fund. There was a fund of money that was  
18 created that PBS paid, PBS and NPR paid the performing  
19 rights societies out of this fund. And they were  
20 limited to that.

21 And I said well, you have stations, such  
22 as you have a major station in Boston, you have one in

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1 New York, etc. These stations raise substantial  
2 revenues in fundraising. Why don't you ask the  
3 stations that have these -- have this revenue, pay  
4 their fair share?

5 Ms. Jameson's response was that this  
6 wouldn't fly, they wouldn't want to pay this and that  
7 basically the monies available to BMI would come from  
8 this fund which was created. I think it's the six  
9 percent fund.

10 Q Now did there come a point in your  
11 negotiations in 1992 when you and Ms. Jameson or  
12 others for public broadcasters discussed the licensing  
13 status of ASCAP with the public broadcasters and how  
14 that related to BMI?

15 A Yes. What happened was after discussing  
16 this changing the parameters of the license fee  
17 structure, namely looking to seek additional monies  
18 from the PBS affiliates. Ms. Jameson said that would  
19 not happen. I said fine, not fine, but I disagreed.  
20 But what happened was I said, okay, since this is  
21 something which you feel cannot happen, I wanted to  
22 make sure that BMI would be paid in proportion to its

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1 then music share. And I sought assurances from Ms.  
2 Jameson that this would be the case. I wanted to make  
3 sure that BMI was not going to be underpaid in  
4 relation to its overall music usage in relation to  
5 ASCAP.

6 Q And did Ms. Jameson provide you with those  
7 assurances in the course of the '92 negotiations?

8 A Ms. Jameson did. She said that she would  
9 make sure that this would be the case.

10 Q Did there come a time when the public  
11 broadcasters actually proposed a fee to BMI with  
12 respect to the 1993/1997 license period?

13 A Yes.

14 Q And I think the record has now shown that  
15 the fee that was ultimately entered into was \$785,000  
16 for that -- per year for that license term. Do you  
17 recall that figure?

18 A Yes I do.

19 Q How was that fee described to you, if it  
20 was, by Ms. Jameson in terms of BMI's music share, or  
21 how that number came into existence?

22 A What happened was the negotiations took

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1 place over a period of time and when I told Ms.  
2 Jameson that BMI wanted to make sure that it got its  
3 fee in relation to its music performance share, Ms.  
4 Jameson ultimately came back to me and said the figure  
5 was \$785,000. I had suggested that we stair stepped  
6 to make different payments. She was adamant that it  
7 had to be a flat sum of \$785,000 per year.

8 And I said to her, is this in relation to  
9 the ASCAP fees? She said, she represented to me that  
10 it was and from that, in order for 785 to be in  
11 relation to the ASCAP fee, in other words, the 20  
12 percent, approximately 20 percent music share that BMI  
13 had, my understanding was that some sort of  
14 understanding had been reached with ASCAP. Whether it  
15 be in writing or not, I don't know. But, some  
16 understand had to have been reached with ASCAP in  
17 order for Ms. Jameson to say \$785,000 is the  
18 appropriate fee to BMI taking into consideration the  
19 ratio of the BMI music performance share vis a vis the  
20 ASCAP share.

21 Q Did you have any discussions with public  
22 broadcasters in the 1992 negotiations about any

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1 confidentiality provisions with the license agreement?

2 A Most definitely so.

3 Q Can you tell the Panel what those  
4 discussions took place?

5 A BMI was very much concerned that this  
6 agreement, if we entered into it, would be  
7 confidential. This was a prime consideration of BMI.  
8 It was made clear to Ms. Jameson that if this were not  
9 the case, BMI would not go forward with the agreement.  
10 This was a king pin to the agreement.

11 Ms. Jameson acknowledged the fact that we  
12 wanted this. We had done this in the past. I don't  
13 recollect whether it was this negotiation or the  
14 negotiation before, but someone raised the issue on  
15 the part of PBS to say well what do you need it?  
16 ASCAP doesn't have it. And I said this is important  
17 to us for our own internal reasons. We need this  
18 confidentiality.

19 And ultimately it was agreed to.

20 Q Now, if you take a look at page four of  
21 your written testimony, Mr. Berenson, you quote on  
22 page four the confidentiality provision. And I'd like

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1 you to tell the Panel whether in fact that is the  
2 provision that was part of the agreement that was  
3 entered into with the public broadcasters for the  
4 1993/1997 license period?

5 A It is.

6 Q And I want to direct your attention to the  
7 highlighted portion of that clause which indicates its  
8 terms, meaning the terms of the agreement shall not  
9 voluntarily be revealed to any one person,  
10 organization or governmental or judicial body,  
11 including but not limited to the Copyright Royalty  
12 Tribunal. Do you see that?

13 A Yes I do.

14 Q And could you tell the Panel what BMI's  
15 intent was at that time, that is back in 1992, with  
16 respect to whether the license fees that it was  
17 entered into with public broadcasting were to be made  
18 known or available to any subsequent Copyright Royalty  
19 Tribunal or CARP?

20 A Well as a --

21 MR. RICH: May I object and ask at a  
22 minimum for a clarification whether the question is

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1 intended for this witness's interpretation of this  
2 language or what BMI wished this language to entail.  
3 I'm simply not clear about the --

4 BY MR. KLEINBERG:

5 Q Let me try and restate the question. My  
6 question was could you tell the Panel what BMI's  
7 intent or understanding was in 1992 when this language  
8 became part of the agreement with public broadcasters,  
9 as to the operation of the clause insofar as future  
10 disclosure is to Copyright Royalty Tribunals or  
11 similar bodies?

12 A It was BMI's intent that this agreement  
13 and the terms of the agreement, mainly the monetary  
14 terms, be kept confidential in all respects to  
15 everyone. In essence, the agreement becomes  
16 nonprecedential. If you can't use it and cite it in  
17 a Copyright Royalty Tribunal manner, and it can't be  
18 used, obviously it's not before any tribunal. Or any  
19 other body, or any other user. It was to be kept  
20 confidential between the parties.

21 I don't know if I've answered your  
22 question, but --

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1           Q       Now, Mr. Berenson, you are aware that in  
2 fact during this proceeding the BMI license fee for  
3 the 1993/1997 agreement, that is the \$785,000, has in  
4 fact been made available to the Panel. And could you  
5 explain the circumstances, as you understand them, as  
6 to how that came about?

7           A       Yes I can. BMI, I was informed, was  
8 approached by counsel for PBS and I was asked to waive  
9 its confidentiality as to the monetary terms. And  
10 basically was told that if we did not waive this  
11 confidentiality we would not be able to use the music  
12 use information which was provided to us by the public  
13 broadcasting system.

14                       BMI found itself between a rock and a hard  
15 place. We certainly did not want this to become  
16 public. But we certainly needed the information in  
17 order to proceed before the CARP. We needed the music  
18 use information in order to establish what BMI's  
19 performance -- music performance share is. We found  
20 ourselves in the position of basically having to make  
21 this public.

22                       And that was basically the reason why we

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1 did so.

2 Q Now Mr. Berenson, you indicate in your  
3 written testimony that ultimately BMI in 1992 agreed  
4 to \$785,000. What alternative at the time did BMI  
5 have, based on your understanding, with respect to  
6 either accepting that proposal from public  
7 broadcasting or not?

8 A Well the alternatives BMI had were either  
9 to accept this or proceed in an action before the  
10 Copyright Royalty Tribunal, the predecessor to the  
11 CARP.

12 Q Could you tell the Panel why BMI did not  
13 pursue a CRT proceeding in 1992 and rather accepted  
14 and went along with the \$785,000 figure and feel free  
15 to examine your testimony. You list various factors  
16 there and I'd like you to go through those factors for  
17 the Panel.

18 A Okay, if I may refer to my testimony. So,  
19 if you do it in the same order, I guess, as sort  
20 forth.

21 Q On page six, the first factor that you  
22 have identified is other litigation involving BMI.

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1 And I'd like you to explain briefly to the Panel what  
2 you were referring to when you talk about that factor  
3 as influencing BMI's decisionmaking about whether to  
4 pursue a CRT proceeding back in 1992.

5 A Well, BMI had been involved in one form or  
6 another in major litigation, I would say approximately  
7 -- I can do the calculation, but I would say 20 years  
8 of war. And what happened was this took on basically  
9 cost BMI an immense amount of resources, both  
10 monetarily and internally with respect to management.  
11 Time of management, time of clerical help to amass the  
12 documentation that is necessary when you are involved  
13 in this litigation.

14 And basically, started going back many  
15 years ago with antitrust litigation that was brought  
16 by CBS and then ultimately there was an action by the  
17 Local Television Broadcasters, Buffalo Broadcasting.  
18 There was an ASCAP proceeding that we were not  
19 directly involved, but indirectly affected by the rate  
20 court case that was proceeding in the ASCAP rate court  
21 vis a vis the local television stations.

22 We then were involved in antitrust

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1 litigation with the National Cable Television  
2 Association -- National Cable Television Association,  
3 again an antitrust claim. And again, HBO, BMI was  
4 involved in antitrust litigation.

5 BMI management said, whoa, this is costing  
6 us a lot of money. Let's stop. These are our  
7 customers. Let's have a period of peace if we can,  
8 after all these years of litigation.

9 So a decision was made at that time that  
10 we would like to undertake a, at least for the  
11 immediate future, a moratorium on major litigation.  
12 From a cost approach and also from a customer  
13 approach. These users are BMI's customers. You don't  
14 want to litigation against customers if you don't have  
15 to.

16 So that was one of the factors. The cost  
17 that was involved was a factor that was considered by  
18 BMI in not proceeding with a CRT proceeding.

19 Q Now in your testimony you indicated that  
20 television antitrust litigation, which included the  
21 Disney Channel and the National Cable Television  
22 Association, and HBO, am I correct that those

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1       litigations ended in 1991?

2               A       Yes.

3               Q       The next factor you've identified in your  
4       written testimony on page seven is Public Broadcasters  
5       voluntary agreement with ASCAP. Tell the Panel what  
6       you meant about that factor.

7               A       Okay. My reasoning on this is ASCAP had  
8       entered into an agreement with Public Broadcasting.  
9       If BMI were to pursue a proceeding before the CRT, it  
10      would be very likely that Public Broadcasters would  
11      march in the agreement that BMI had with -- ASCAP had  
12      with PBS. And that would set a benchmark, a ceiling.

13              Now at that particular time, if we were to  
14      change the parameters of what we were seeking, as we  
15      are here, aiming to compare public broadcasting to the  
16      commercial broadcasters, my opinion would be that the  
17      CRT would say there is an agreement out there that was  
18      made. This should be the ceiling. BMI has less music  
19      than ASCAP and this would not bode well for BMI to  
20      proceed unilaterally at that time with the CRT.

21              JUDGE GULIN: Why do you think the CRT  
22      would have used that agreement as a benchmark or

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1 ceiling?

2 THE WITNESS: Because I think at that  
3 particular time, since it was a fresh agreement, it  
4 could be brought before the Tribunal by PBS, as  
5 saying, here is an agreement that was reached.  
6 Similar, you know, similar type organization.

7 JUDGE GULIN: So your fear was that that  
8 would constitute compelling evidence for the CRT?

9 THE WITNESS: I think it would have made  
10 -- when I say compelling, I think it would be a factor  
11 that the CRT would use. I think that ultimately it  
12 would be more difficult to prevail under those  
13 circumstances, where at least one of our competitors  
14 had entered into such an agreement. Whereas if, you  
15 know, to change the parameters of the licensing  
16 structure under those circumstances and if we are  
17 starting -- and I will say to some extent with a clean  
18 slate, that everyone is saying look, change the  
19 parameters here.

20 Two major, two major suppliers of PBS are  
21 doing this the same. It's time to look at a new  
22 method of assessing license fees. We should, you

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1 know, we should look at what a reasonable rate would  
2 be under circumstances of comparing these fees to a  
3 commercial broadcaster.

4 BY MR. KLEINBERG:

5 Q And did you indicate that BMI's market  
6 share then in 1992 time period was an item that was  
7 also a factor in that calculus in terms of whether to  
8 proceed with the CRT proceeding then?

9 A Definitely. Our market share was, I would  
10 say I think ASCAP's at that time we were at about, I  
11 think about 20 percent, so ASCAP was probably about 80  
12 percent. So, you know, when you are dealing with a  
13 situation where you have a --

14 JUDGE DREYFUS: This is in 1992?

15 THE WITNESS: Nineteen --

16 JUDGE DREYFUS: Or do you mean the  
17 previous five years?

18 THE WITNESS: Well we were dealing with  
19 numbers from prior -- prior to 1992. But we would be  
20 going in with those numbers in 1992. So, you know, we  
21 were dealing with numbers in let's say the 19 to 20  
22 percent range.

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1 BY MR. KLEINBERG:

2 Q Now one of the other factors you mentioned  
3 on page eight of your testimony was that public  
4 broadcasting was under political attack. What did you  
5 mean by that?

6 A Well, public broadcasting, there had been  
7 an attempt to cut back funding for public  
8 broadcasting. In fact, all types of attacks in  
9 Congress on public broadcasting. Many of the  
10 supporters of public broadcasting were also supporters  
11 of BMI, performing rights organizations, intellectual  
12 property issues.

13 And this is a factor which was considered  
14 by BMI saying that if we took on CRT when they were  
15 being attacked, this would not -- you know, it could  
16 be construed as well, we are picking on PBS, NRP when  
17 they are down, when they are being attacked. And we  
18 did not want to alienate the people that would support  
19 the performing rights organizations in Congress.

20 Q I think you may have said the CRT was  
21 under attack. Did you mean PBS or --

22 A I meant PBS. Sorry. Too many -- too many

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1 letter, BMI, ASCAP.

2 Q I failed to ask you about one of the other  
3 items you listed on page seven, which was BMI's  
4 negotiations with other music users. And what impact  
5 that had on your decisionmaking in 1992 with respect  
6 to whether to proceed with the CRT.

7 A BMI negotiates with many different users.  
8 Many times committees, and sometimes individually.  
9 And invariably some of the users say well, you are  
10 only getting paid this much in this particular venue,  
11 this particular industry. We should be paid like this  
12 industry.

13 Basically we did not want this to become  
14 public at that time, that we had a 20 percent share of  
15 the music performance. We weren't proud of it. Our  
16 numbers have increased since that period of time and  
17 we felt that it would not -- those numbers could be,  
18 and I use the term not in any nefarious way, but to be  
19 misused, attempt to be misused by some of the users  
20 negotiating with BMI to say well, you are only getting  
21 this much from public broadcasting, you only have 20  
22 percent of the market share here, we should apply that

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1 same rate.

2 Q And were the shares in the other media  
3 that low at that time? BMI shares?

4 A No, they were not.

5 Q The final --

6 CHAIRPERSON GRIFFITH: Mr. Kleinberg, let  
7 me just ask one thing. Do you think that the 19 to 20  
8 percent was accurate as given to you by Ms. Chambers?

9 THE WITNESS: I believe it was accurate.  
10 I mean -- again, I'm not an economist but I have no  
11 reason to doubt those numbers. When she presented  
12 them to me, I verified with my, you know, internally  
13 that that was approximately the number. It could be  
14 a point or two either way.

15 CHAIRPERSON GRIFFITH: Right.

16 BY MR. KLEINBERG:

17 Q Mr. Berenson, the last item you mention in  
18 your written testimony about the factors bearing on  
19 BMI's decisionmaking in 1992 was no final commercial  
20 television rates were agreed to until after the 1992  
21 Public Broadcasting/BMI agreement was concluded.  
22 Would you explain what you meant with respect to that

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1 section of your written testimony?

2 A Surely. If BMI were to proceed before the  
3 CRT at that time along the parameters that we are  
4 doing here, namely to look at the commercial  
5 broadcasters, you know, as a level at which to set a  
6 fee here. At least somewhere to look to see where  
7 these fees should be set. These fees that BMI had  
8 with local television and the television networks were  
9 what I would refer as interim.

10 As I mentioned before, ASCAP was in a rate  
11 court proceeding with the local television industry.  
12 And while BMI was not in that case, BMI's fees were  
13 based on a percentage of the ASCAP fees. So as a  
14 result of that, in theory, just -- I'll try to do  
15 this. And I believe, if I remember correctly, that  
16 the local television broadcasters were asking in the  
17 rate court proceeding for a reduction of  
18 approximately, I think, 70 some odd percent, 70 -- 75  
19 percent reduction in fees.

20 So in theory, if BMI, if ASCAP were  
21 getting a dollar and it went down to, it was reduced  
22 75 percent, it would go down to 25 percent, BMI would

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1 commensurately go down. The fees were not set in  
2 stone.

3 Additionally, as I said, the networks,  
4 when I call them the alphabet networks, ABC, NBC, CBS  
5 agreements had most favored nations provisions. Vis  
6 a vis ASCAP, ASCAP fees and vis a vis each other.

7 So while all this litigation was pending,  
8 and I believe there was litigation between ASCAP and  
9 the television networks at the time, to set an  
10 appropriate license fee, these fees were interim. And  
11 if we went before the CRT and said look at the  
12 television industry for fees, they could very well --  
13 I think they would say these are interim fees. We  
14 cannot rely upon them.

15 And I believe in, I think it was 1978, a  
16 similar situation happened when ASCAP went before the  
17 CRT and an issue was raised by PBS at that time to say  
18 there is antitrust questions as to these fees, whether  
19 they are legitimate fees. They should not be  
20 considered by the CRT at that time.

21 So I thought that this is another -- was  
22 another factor in mitigating, in 1992, not to proceed

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1 with a CRT proceeding at that time.

2 Q And as a consequence, Mr. Berenson, did  
3 BMI enter into the \$785,000 license agreement with the  
4 Public Broadcasters in 1992?

5 A Yes it did.

6 Q I have no further questions.

7 CHAIRPERSON GRIFFITH: All right. Mr.  
8 Schaeffer?

9 CROSS EXAMINATION

10 BY MR. SCHAEFFER:

11 Q I have just a few. Mr. Berenson, you  
12 mentioned in your testimony you freshened convergence  
13 in the programming. There was some discussion with  
14 Ms. Jameson about that. would you tell me what you  
15 mean by -- tell the Arbitrators what you meant by --  
16 what you understood convergence in programming means  
17 in the public broadcasting system and commercial  
18 broadcasting system?

19 A Yeah --

20 MR. RICH: May I ask for a clarification  
21 of the question as to whether the question is whether  
22 this was Mr. Berenson's understanding or that which he

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1 had had reported to him by commercial broadcasters as  
2 to that?

3 MR. SCHAEFFER: No, I think I was very  
4 clear. I said what was his understanding.

5 CHAIRPERSON GRIFFITH: All right. His  
6 understanding.

7 MR. SCHAEFFER: I think it's very explicit  
8 --

9 MR. RICH: All I'm seeking is whether  
10 there was a foundation, and I may be wrong in  
11 misrecollecting in the testimony that Mr. Berenson  
12 stated these are his own view during the negotiations.  
13 As opposed to reporting to PBS what he had heard  
14 commercial broadcasters reporting as to that.

15 CHAIRPERSON GRIFFITH: Well he has asked  
16 for his and can't you cross examine Mr. Rich on that?

17 MR. RICH: Fair enough, I just think the  
18 record may be misleading. Sure.

19 CHAIRPERSON GRIFFITH: All right. Go  
20 ahead sir.

21 THE WITNESS: I think that the  
22 programming, in my opinion, when PBS started was

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1 different than it is in 1992 and it is different than  
2 it is today. You have concerts on PBS, you have pop  
3 concerts on PBS. You have movies on PBS. It's not  
4 just educational-type programming. Not just  
5 childrens-type programming that it used to be.

6 So broadcasters, in my mind, well, when  
7 they said it was convergent, to my mind, I took this  
8 to mean that the programming had become more similar  
9 than it had been historically.

10 BY MR. SCHAEFFER:

11 Q When you mentioned television in your  
12 answer, did you mean to exclude radio as well?

13 A Mr. Schaeffer, I did not mean to exclude  
14 or include. I'm really basically referring to  
15 television programming.

16 Q Now, you also referred to a six percent  
17 fund Ms. Jameson described to you. Was it your  
18 understanding, your understanding that the performing  
19 rights organizations, they were required by law only  
20 to look to the six percent fund of CPD or could they  
21 look to other funds from the public broadcasters?

22 A My understanding is that they could look

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1        wherever they had to to fund the fees. I don't think  
2        they -- I don't think they are prescribed or prevented  
3        by law to ask an affiliate to ante up if that's what's  
4        necessary.

5                Q        And finally, I know it's difficult to make  
6        this estimate because there are interim fees during  
7        that period of time. But could you give the  
8        Arbitrators your understanding of what relative  
9        proportions public broadcasting licensees, radio and  
10       television, would have been to the overall license fee  
11       revenues from television and from commercial radio,  
12       commercial television, local television and networks,  
13       what that would have been in the period? Was it 20  
14       percent, 30 percent? Can you give us a ballpark  
15       figure. Or would it have been less than five percent?

16              A        Mr. Schaeffer, I really don't have that  
17       information in front of me. It would just purely be  
18       a guess. I know it is a very small amount in relation  
19       to commercial television.

20              Q        Well, isn't it a fact that you were  
21       getting \$750,000 a year --

22              A        Seven eighty five.

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1 Q -- during that period of time.  
2 Approximately what kind of revenues was BMI getting  
3 during those same years from local television, network  
4 television and broadcast. Is this less than five  
5 percent of your revenue?

6 A I would say it's less than five percent.

7 Q Thanks.

8 CHAIRPERSON GRIFFITH: All right. Mr.  
9 Rich?

10 CROSS EXAMINATION

11 BY MR. RICH:

12 Q Thank you, your Honor. Good morning, Mr.  
13 Berenson.

14 A Good morning Mr. Rich.

15 Q You appear to have a quite remarkable  
16 recall of the details and even the sequence of events  
17 relating to BMI's 1992 negotiations with the Public  
18 Broadcasters. I take it this is all strictly from  
19 memory?

20 A This is from memory, Mr. Rich. Certain  
21 things do stick in your mind when you negotiated. Not  
22 every factor, but certain key points do stick in your

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1 mind when you are dealing with the user and you  
2 negotiate over a period of years.

3 Q You didn't refresh yourself by reference  
4 to contemporaneous notes or minutes of meetings, I  
5 take it. Is that right?

6 A That is correct.

7 Q And were you refreshed as to these events  
8 by your lawyers, to your knowledge, their own review  
9 of such documents?

10 A No, what is in my prepared statement is  
11 from my memory.

12 Q Okay. Let me see how good your memory is  
13 as to certain other aspects of the same negotiations.  
14 Do you recall that the first negotiating session  
15 between BMI and the Public Broadcasters occurred  
16 sometime in early July 1992? Does that sound about  
17 right to you?

18 A About right.

19 Q And do you recall being present at that  
20 first meeting?

21 A I must have been since I was negotiating  
22 on behalf of BMI, Mr. Rich.

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1 Q And do you recall Ms. Jameson being  
2 present as one of the representatives of Public  
3 Broadcasting at that first meeting?

4 A Again, she was the one I dealt with. She  
5 must have been present, if that was the date.

6 Q I take it at the time of this first  
7 meeting, that is the early July meeting, it was not  
8 your understanding that the Public Broadcasters had  
9 already reached an agreement for the 1993 to 1997  
10 period with your principal competitor ASCAP. Correct?

11 A That would be my understanding.

12 Q Okay. Now do you recall making some  
13 opening remarks at that first meeting?

14 A Specific remarks, no. I could have been  
15 -- the answer is not specific remarks, no.

16 Q Let me ask you whether you recall having  
17 made certain statements at that meeting. Again,  
18 testing your general recollection. Do you recall  
19 stating in words or substance that while BMI was not  
20 overjoyed with the prior agreement, meaning the  
21 agreement from the 1983 to the -- pardon me, the 1987  
22 to 1992 period, it recognized that it had certain

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1 mutually beneficial aspects.

2 A Surely, because BMI -- BMI -- anytime BMI  
3 has an agreement with a user the music that is license  
4 by BMI, the works of its authors and composers are  
5 being performed publicly. And there is a benefit to  
6 give the authors -- the creators of music, air time  
7 and exposure. So there are certainly mutual benefits.

8 Q Do you recall stating that as to public  
9 television, BMI had concluded that more music was  
10 being used than at the time of the prior negotiations?

11 A This is what period of time?

12 Q In 1992 at this first meeting.

13 A More -- I'm sorry, more BMI music than --

14 Q Do you recall advising the Public  
15 Broadcasters of BMI's view that more music overall was  
16 being used by Public Broadcasting than had been the  
17 case at the time of the prior negotiation?

18 A I don't recollect that specific statement,  
19 Mr. Rich.

20 Q Do you recall Ms. Jameson, in response to  
21 such a statement, indicating that the Public  
22 Broadcasters' own music use data shown that there had

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1 not been any overall growth in music usage over the  
2 past five year period?

3 A I recollect -- I don't recollect that from  
4 1992, I recollect that comment I believe for the 1990  
5 -- I'll call the 1997 negotiations, Mr. Rich.

6 Q Do you recall Ms. Jameson advising you at  
7 this first 1992 meeting between BMI and the Public  
8 Broadcasters that based on the Public Broadcasters'  
9 own music use data the BMI/ASCAP music use ratio  
10 remained unchanged from the prior five year period?

11 A I don't remember -- I don't recollect that  
12 at all.

13 Q Do you recall stating at this first  
14 meeting that if a CPI adjustment were made to the  
15 existing deal, that is the deal covering the period  
16 through 1992, BMI would be owed about \$820,000 a year  
17 by the Public Broadcasters?

18 A No. If I did I really -- if I did make  
19 that statement I really made a bad deal because I  
20 didn't get the CPI adjustment. I don't recollect that  
21 statement at all.

22 Q Do you recall before the first meeting

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1 ended that you made the first fee proposal to the  
2 Public Broadcasters in this round of negotiations,  
3 that is the 1992 round?

4 A I don't remember either way, Mr. Rich.

5 Q If I were to ask you whether it refreshes  
6 your recollection that toward the end of the first  
7 meeting, you told the Public Broadcasters that BMI's  
8 "bottom line" was a fee of \$821,000 per year  
9 reflecting a CPI adjustment. Does that refresh your  
10 recollection that you, as BMI's principal  
11 representative, made that fee proposal at the very  
12 first meeting between you and the Public Broadcasters  
13 in early July of 1992?

14 A It does not refresh my recollection, Mr.  
15 Rich.

16 Q So the only recollection, I take it Mr.  
17 Berenson you have, as to fees was that at some point  
18 later in the process the Public Broadcasters brought  
19 you a number offering you fee parity with ASCAP. That  
20 is your sole recollection of the give and take of the  
21 numbers during the 1992 negotiations?

22 A Not exactly, Mr. Rich. As I said, I

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1 attempted to change the parameters of what the license  
2 fee structure would be. Namely, to take into  
3 consideration the revenues that were generated by the  
4 local affiliates.

5 I was rebuffed rather -- I won't say  
6 sternly. But it was made clear to me that this is not  
7 going to happen, even though it was raised a few  
8 times. It would not happen.

9 So in a sense while I cannot ascribe a  
10 particular fee to that, that was certainly a change in  
11 the amount of fees that BMI would want to generate  
12 from PBS, but not a specific number.

13 Q I'm going to show you a document for  
14 purposes of further refreshing your memory, which I  
15 will represent to you is a set of minutes prepared of  
16 a July 9, 1992 negotiating session, prepared by the  
17 Public Broadcasters. And we'd like to mark that if we  
18 may as the next exhibit. We think it's 30, your  
19 Honor.

20 I'd ask you to take just a few --

21 CHAIRPERSON GRIFFITH: Wait Mr. Rich, hold  
22 on.

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1 MR. RICH: Pardon me.

2 CHAIRPERSON GRIFFITH: I want to identify  
3 it. [Pause.] All right, the Public Broadcasters  
4 Exhibit 30X.

5 (Whereupon, the above-  
6 referenced document was marked  
7 as Public Broadcasters Exhibit  
8 30X for identification.)

9 MR. RICH: Thank you.

10 MR. SCHAEFFER: Can I just ask for a few  
11 minutes so I can read this.

12 MR. RICH: Well, I think -- I was going to  
13 ask the witness to take his time reading through it so  
14 he can have it in its full context.

15 THE WITNESS: Do you want me to read the  
16 whole thing, Mr. Rich?

17 MR. RICH: I think it won't take you very  
18 long. You might want to. You most certainly want to  
19 read page eight.

20 JUDGE DREYFUS: Is the entire document  
21 ending with page nine?

22 MR. RICH: Yes it is.

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1 MR. DiMONA: Is --

2 JUDGE DREYFUS: It's a complete document  
3 in and of itself.

4 MR. RICH: Yes, it is.

5 MR. DiMONA: Do --

6 MR. RICH: I do not.

7 Have you had a chance to review this  
8 document?

9 CHAIRPERSON GRIFFITH: Before you  
10 continue, Judge Dreyfus has one question.

11 MR. RICH: Yes.

12 JUDGE DREYFUS: Surely. Could you tell us  
13 what medium was used to record this or what person  
14 actually did the recording?

15 MR. RICH: We will have Paula Jameson,  
16 Your Honor, on the stand who will answer questions  
17 about the basis on which this document was --

18 JUDGE DREYFUS: You can sponsor this in?

19 MR. RICH: Yes.

20 JUDGE DREYFUS: Okay.

21 MR. SCHAEFFER: Well, --

22 MR. KLEINBERG: That would be beyond the

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1 scope of direct. This is clearly beyond the scope of  
2 her rebuttal testimony and we will deal with her when  
3 we get there.

4 But the fact of the matter is that I don't  
5 want to acquiesce to the fact that Mr. Rich says she  
6 is going to address this because she could address  
7 nothing.

8 JUDGE GULIN: Right now it is just being  
9 used --

10 MR. RICH: Precisely, to refresh this  
11 witness' recollection.

12 JUDGE DREYFUS: Right. But I think the  
13 witness and the Panel should know how this document  
14 was prepared.

15 By your representation, prior to Ms.  
16 Jameson coming to sponsor the document.

17 MR. RICH: Well, I am prepared to  
18 represent to the panel that these were contemporaneous  
19 notes taken by one of the participants on behalf of  
20 the public broadcasters at the meeting, who took long  
21 hand notes of the meeting.

22 It does not, as it indicates in block

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1 caps, purport to be verbatim quotes but a synopsis of  
2 the main points covered at the meeting, and was  
3 recorded thereafter, internally, by PBS in the normal  
4 course of business.

5 MR. SCHAEFFER: ASCAP will accept the  
6 document as it stands.

7 JUDGE DREYFUS: And, for example, on page  
8 five, there is a paragraph in the middle, "We also  
9 want to point out," et cetera.

10 MR. RICH: Yes.

11 JUDGE DREYFUS: Then it has got a question  
12 mark in parentheses and then brackets.

13 Could someone elaborate? What is that all  
14 about?

15 MR. RICH: Yes. I am surmising, but this  
16 document evidently was transmitted internally among  
17 other participants from the meeting.

18 It is not uncommon to say that my notes  
19 drop off at this point, could somebody please, from  
20 their own notes, elaborate on the point that was made.

21 That is only a surmise on my part, but  
22 that is how I interpret that particular passage.

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1 MR. SCHAEFFER: It might be helpful that  
2 it says 'Draft' on it.

3 CHAIRPERSON GRIFFITH: Well, I think at  
4 this point, we simply are using it to refresh the  
5 witness' recollection.

6 MR. RICH: Precisely. I had not gotten to  
7 the point of offering it beyond that. But I  
8 appreciate Judge Dreyfus' questions.

9 Mr. Berenson, having had a chance to  
10 review this document which reflects what it purports  
11 to be the first negotiating session, does this  
12 generally and fairly, to your recollection, set forth  
13 at least the general substance of the back and forth  
14 of that meeting? To the best of your recollection?

15 THE WITNESS: Mr. Rich, it basically does.

16 But again, when this last indication about  
17 my quote, I must admit, after reading this it does not  
18 refresh my recollection at all.

19 But for the most part, it is a general  
20 recitation of what probably happened.

21 Q Sitting here today, you don't deny that  
22 you made this proposal, you are simply, just to be

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1 clear, you are simply indicating that you don't have  
2 a recollection, is that correct?

3 A That is correct.

4 Q I didn't see anywhere in this document a  
5 suggestion that you tried to move the level of fee  
6 discussion at this first meeting. I didn't see that  
7 in these notes.

8 A I think --

9 MR. KLEINBERG: Let me object. I don't  
10 think that is a question.

11 MR. RICH: And that is a predicate to my  
12 question which is, are you certain, sitting here  
13 today, that you made that effort during the 1992  
14 negotiations as opposed, perhaps, during the 1997  
15 failed negotiations?

16 THE WITNESS: If you look at page two, for  
17 example, I bring up the issue about the commercial  
18 broadcasters complaining about commercials on public  
19 television.

20 Just bear with me a moment.

21 The fact that, and again indirectly, Mr.  
22 Rich, on page five, that public broadcasters and I am

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1 lumping NPR and PBS together at this stage, saying  
2 they don't have money et cetera, they are losing  
3 money.

4 My response, according to this, every  
5 group that we sit across from has the same complaint,  
6 that they don't have money to pay.

7 Bear with me.

8 On page seven, under Berenson, the one up  
9 at the top, I discuss a per centage of revenue  
10 approach to royalty payments which was rejected.

11 Again, a different scenario on page eight.  
12 We talk about a shorter term deal, about possibly a  
13 reopener, if BMI does obtain ASCAP writers that have  
14 product on PBS to have a reopener.

15 So, my testimony won't change, Mr. Rich.

16 Q But just so you are clear, your testimony  
17 is not a denial that you, in fact, before the end of  
18 the first meeting, made an offer of \$821,000 over five  
19 years, is that correct?

20 A That is correct. I have no recollection  
21 either way.

22 Q And sitting here today, do you recall

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1 making any higher fee proposal at any time during the  
2 1992 negotiations than \$821,000 per year over five  
3 years?

4 THE WITNESS: Mr. Rich, I don't recollect  
5 making any number demand or quotation.

6 I do remember attempting to change the  
7 parameters of the license agreement; the methodology  
8 in which the license fees would be paid to BMI.

9 Every attempt that I attempted was  
10 rejected by PBS and NPR. And I guess the Corporation  
11 for Public Broadcasting, my recollection is that Mr.  
12 Gherardi was there also.

13 Every time I turned to come up with a new  
14 concept to have a methodology to pay BMI on a  
15 different basis, it was rejected.

16 I do not recollect any number quotes. I  
17 do not. I cannot say whether it was high or low or  
18 anything of the sort.

19 Q Do you have any reason, sitting here  
20 today, that would account for notes recording what it  
21 is represented to be a bottom line offer from you on  
22 July 9, if such an offer was, in fact, not made?

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1                   Would you have any explanation for that?

2                   A       No, Mr. Rich, I have no explanation unless  
3                   someone would intentionally want to do it. I have no  
4                   reason to believe that someone would intentionally put  
5                   something down that did not occur.

6                   Q       Now just so we are clear, when you say you  
7                   tried to change the parameters, I take it you did not  
8                   try to change the parameters in 1992 to get BMI at or  
9                   close to commercial parity, did you?

10                  A       Didn't get that far, Mr. Rich. I  
11                  attempted to broach the subject with Ms. Jameson by  
12                  saying that the revenues that were raised by the local  
13                  stations in their fundraising drive should be used to  
14                  pay fees to BMI.

15                         That would be a method of changing the  
16                  parameters. A reopener is a method of changing the  
17                  parameters if BMI obtained a higher market share.

18                         These attempts were rejected.

19                         I don't know how else to answer you. I  
20                  hope I have answered your question, Mr. Rich.

21                  Q       You acknowledge in your testimony, Mr.  
22                  Berenson, that BMI was concerned over having it become

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1 publicly known that its music use share in public  
2 broadcasting was as low as 20 per cent, is that  
3 correct?

4 A That is correct.

5 Q Basically, as I understand your testimony,  
6 BMI didn't want to be harmed in its negotiations with  
7 other users on account of this date becoming known,  
8 correct? Because they might chose to use it to their  
9 own bargaining advantage?

10 A That is one of the factors, yes.

11 Q That was a significant factor, was it not,  
12 to BMI?

13 A It was one of the significant factors, Mr.  
14 Rich.

15 Q But it was a significant factor, is that  
16 correct?

17 A It was a factor, Mr. Rich.

18 Q Was a significant factor, Mr. Berenson?

19 A I don't know how you want to quantify it.

20 I also said that in BMI's terms that this  
21 clause, the confidentiality clause would become non  
22 precedential because it couldn't be used before CRT.

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1                   So, I guess they are equally important.  
2           However you want to phrase it, whether it is  
3           significant or a factor.

4           Q       Isn't it a fact that the primary reason  
5           that BMI sought confidentiality with respect to both  
6           the 1987 and 1992 contracts, the fact that it didn't  
7           want it to be publicly known that its music use share  
8           and resulting fee ratio, vis a vis ASCAP was as low as  
9           it was?

10          A       That is a factor, Mr. Rich.

11          Q       Wasn't that the primary motivating factor,  
12          Mr. Berenson, in seeking and securing confidentiality  
13          as it appears in the 1987 and 1992 agreements?

14                   MR. KLEINBERG: I'm going to object to the  
15          form of the question because I believe it misstates  
16          the testimony.

17                   I     believe     Mr.     Rich     said     the  
18          confidentiality agreement spoke in terms of the share.

19                   MR. RICH: Let me rephrase.

20                   Mr. Berenson, you gave testimony and  
21          quoted a confidentiality clause appearing in the 1992  
22          agreement, is that correct?

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1 THE WITNESS: Yes.

2 Q And that or a similar version appeared in  
3 a prior license agreement, is that correct?

4 A That is correct.

5 Q And my very direct question to you is, is  
6 it not a fact that the main motivating impetus on  
7 BMI's part for inclusion of that clause was to avoid  
8 it becoming publicly known that BMI's fee ratio in  
9 relation to ASCAP was as low it was in public  
10 broadcasting?

11 A Mr. Rich, let me answer this the best I  
12 can. It was certainly a factor.

13 But if you look at the language on page  
14 four of my written testimony, the words that are in  
15 italics were important. It gave a reference to the  
16 CRT.

17 It was BMI's intention not only that it  
18 should not become public to other users, but also it  
19 shouldn't be used at a proceeding. It says  
20 specifically, "including but not limited to the  
21 Copyright Royalty Tribunal."

22 Q I don't think you are quite responding, at

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1 least to the intent of my question.

2 Let me try again.

3 A Okay.

4 Q I know what the language says and what you  
5 interpret it to mean.

6 What I am getting at is, you testified  
7 about BMI's motives for that provision.

8 I am asking you whether or not you agree  
9 with me when I suggest to you that the principle  
10 motivating concern of BMI for the inclusion of that  
11 language was its concern that BMI didn't now show  
12 well, vis a vis ASCAP in terms of its music, use  
13 ratio, and its fee ratio, in public broadcasting?

14 A It was a significant factor, Mr. Rich.

15 Q Now, you testified in response to Mr.  
16 Kleinberg's questioning that, in your way of viewing  
17 it, it became tantamount to being a non precedential  
18 clause, something to that effect?

19 A Something to that effect, yes.

20 Q I don't see the language, non  
21 precedential, in there. Is it anywhere in the clause?

22 A It is not, Mr. Rich.

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1 Q Are you familiar with any other BMI  
2 agreements that include the words non precedential in  
3 them?

4 A Yes, I am.

5 Q So, BMI was familiar with how to draft  
6 such a concept when it wanted to, as of 1992?

7 A There are many ways to get to the same  
8 point, Mr. Rich.

9 If it cannot be produced before CRT, the  
10 only body that, at that time, could hear the rates, it  
11 certainly would be confidential and it would not be  
12 precedential because it could not be brought before  
13 them.

14 Q Am I correct, that as of 1992 BMI had in  
15 place any number of other license agreements with  
16 commercial broadcasters and perhaps other users which  
17 incorporated the words non precedential?

18 A That would be a correct statement.

19 Q Now, I take it from your direct testimony,  
20 that a key objective of --

21 A Excuse me. Mr. Rich, any time one wanted  
22 to change a comma in these agreements it became a

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1 major undertaking.

2           So, while I can't deny there were other  
3 BMI agreements that had the words non precedential in  
4 them, if this language effectively had the same bottom  
5 line, same effect, knowing that the language of these  
6 agreements was very difficult to change, because they  
7 were, in many instances, the same language year after  
8 year, again I just want to make it clear that it was  
9 not something I would say to Ms. Jameson, I want to  
10 change this paragraph to read as follows and Ms.  
11 Jameson would say, fine, no problem.

12           It would not change that easily, Mr. Rich.  
13 I just wanted to make that comment. Sorry.

14           Q     Is it your testimony that you sought  
15 explicitly to change some pre-existing language in  
16 1992 to insert the word non precedential and that  
17 public broadcasting rejected that effort?

18           A     That is not my statement at all.

19           Q     Now, I take it that you have also  
20 testified that a key objective of BMI's in 1992, as  
21 being treated equitably vis a vis ASCAP, is that  
22 correct?

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1 A Yes.

2 Q And you indicated that that, in part,  
3 prompted a fee response from the public broadcasters  
4 at or about \$785,000 a year?

5 A At one point, yes.

6 Q And you understood that, I take it, in  
7 good faith to align you in terms of your relative  
8 music use per centages as you then understood them,  
9 with what was represented to you to be the then  
10 developing ASCAP deal, is that correct?

11 A Yes.

12 Q So, viewed then at least along that  
13 parameter, BMI in fact was being treated equitably in  
14 1992 by public broadcasting, is that correct?

15 A If you look at the parameters that were in  
16 existence at that time, yes, vis a vis the music  
17 performance share.

18 Q I take it during 1992, neither you or any  
19 other BMI representative, to your knowledge, had  
20 discussions with ASCAP concerning the license fees  
21 that ASCAP was proposing to charge the public  
22 broadcasters, is that correct?

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1           A       BMI never had discussions with ASCAP about  
2 license fees.

3           Q       So, for example, you had no knowledge in  
4 1992, that ASCAP was prepared to agree royalties  
5 significantly below ASCAP valued its repertory to be  
6 worth, did you?

7           A       This is 1992?

8           Q       Yes.

9           A       No.

10          Q       You did not understand that to be ASCAP's  
11 typical practice, did you? Namely to seek and secure  
12 royalties below what ASCAP believed to be reasonable?

13          A       I can't comment on that, Mr. Rich?

14          Q       You can't?

15          A       I think that ASCAP would want to obtain  
16 for its members, would want to maximize the revenues  
17 it obtained from users on behalf of its members.

18          Q       Indeed, that has been your experience now,  
19 over more than 20 years at BMI, is that correct?

20          A       I guess with the exception of PBS.

21          Q       With benefit of hindsight?

22          A       I don't know whether it was benefit of

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1 hindsight. I think PBS had been, and I hate to use  
2 this term, like motherhood and apple pie.

3 I think that in what you gave me to look  
4 at today, I said there is a special relationship that  
5 PBS and NPR are kind of a special situation.

6 Q You acknowledge that section 118 views PBS  
7 as something special, too, don't you?

8 MR. KLEINBERG: Objection.

9 CHAIRPERSON GRIFFITH: On what basis,  
10 please?

11 MR. KLEINBERG: Form.

12 MR. RICH: I think the question is proper.

13 MR. KLEINBERG: What legal conclusion?

14 MR. RICH: The general counsel of the  
15 organization, Your Honor, testifying in a 188  
16 proceeding.

17 MR. SCHAEFFER: What does special mean?

18 JUDGE DREYFUS: The witness used special  
19 in his previous answer.

20 MR. SCHAEFFER: But not in relation to  
21 118.

22 MR. RICH: Do we need a Greek chorus here,

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1 Your Honor? I think he understands the question.

2 MR. SCHAEFFER: I object to the wisecrack  
3 by Mr. Rich. I think I have a perfect right to  
4 object, Mr. Rich.

5 CHAIRPERSON GRIFFITH: The objection to a  
6 Greek chorus is stricken from the record.

7 Can you answer the question?

8 THE WITNESS: I think I can.

9 CHAIRPERSON GRIFFITH: Go ahead, please.

10 THE WITNESS: I think that PBS, section  
11 118, complies to a compulsory license for the Public  
12 Broadcasting Systems. And a special methodology to  
13 assess fees if the parties cannot agree, as compared  
14 to commercial broadcasters.

15 But my recollection is there is no  
16 provision in there, I haven't looked at this in a  
17 while, Mr. Rich, to say that the performing rights  
18 organizations should subsidize public broadcasting.

19 And I think, I am doing this from memory,  
20 Mr. Rich, I think there was something in the House  
21 report or the Congressional report, that there should  
22 not be a subsidy.

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1 So, special, they were different.

2 Q Section 118 doesn't apply to BMI's  
3 relationships to commercial local broadcasters, does  
4 it?

5 A No, it does not.

6 Q Same question with respect to the ABC, CBS  
7 and NBC television networks?

8 A No, section 118 applies to public  
9 broadcasts.

10 Q Now back to 1992, I believe you agree with  
11 me that you had no knowledge in 1992 that ASCAP was  
12 seeking to do anything other than achieve a fair  
13 royalty rate from public broadcasters, is that  
14 correct?

15 A Yes.

16 Q And indeed you were aware in 1992, were  
17 you not, that ASCAP had shown a willingness to engage  
18 in numerous Rate Court proceedings. Indeed you have  
19 testified to certain of those with respect to other  
20 users with whom it had disagreements, is that correct?

21 A Yes.

22 Q And you were also aware in 1992, were you

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1 not, that ASCAP had previously gone to the CRT with  
2 respect to the very users involved here, namely public  
3 broadcasters, is that correct?

4 A Did you say the year?

5 Q In 1992, my question asks, you were aware  
6 were you not, that ASCAP when it had previously  
7 reached loggerheads with public broadcasting at an  
8 earlier rate had indeed repaired to the CRT for  
9 relief, is that correct?

10 A Yes.

11 Q Now, I believe you testified in response  
12 to Mr. Kleinberg that you also had participated in the  
13 1987 negotiations with Public Broadcasting, is that  
14 correct?

15 A Yes.

16 Q Is it your recollection that the fee that  
17 BMI agreed to at that point in time covering the 1988  
18 to 1992 period, was caused by the inevitable result,  
19 from BMI's standpoint, of a done-deal between public  
20 broadcasters and ASCAP?

21 A Yes.

22 ASCAP had the lion's share of the music

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1 performance share of the market. My recollection, and  
2 this is pure recollection, Mr. Rich, was that PBS and  
3 NPR basically went to ASCAP, and I cannot say they  
4 reached a signed agreement but had an understanding  
5 with them.

6 Then ultimately came back to BMI. And BMI  
7 wanted to make sure that it was getting its share in  
8 relation to its music performance share which was  
9 lower back in earlier years.

10 So, my understanding is that PBS and NPR  
11 came back to BMI and said this is what your market  
12 share is, this is the dollars in relation to what that  
13 market share equals, and that is how it came about.

14 Q Which period are you testifying  
15 concerning?

16 A Basically, the 1992 agreement and the one  
17 prior.

18 Q Though you concede to me as to the 1992  
19 agreement that you have absolutely no recollection of  
20 any other fee proposals that were exchanged between  
21 the parties prior to that event occurring, is that  
22 correct?

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1           A       I don't recollect making any numbers back  
2 and forth. I do remember \$785,000 as basically coming  
3 to me.

4                   I don't remember my making the proposal  
5 you say is in the minutes. I can't say yes or no, I  
6 testified to that.

7                   I think I have answered your question, Mr.  
8 Rich.

9           Q       I believe in response to Mr. Schaeffer,  
10 you indicated that as a per cent of its overall  
11 broadcasting revenues, what BMI has obtained from  
12 public broadcasting is a relatively small per centage,  
13 is that correct?

14           A       Yes.

15           Q       Now, in other dealings with commercial  
16 broadcasters who represent a much larger per centage  
17 of BMI's income, it is not unheard of, is it, for BMI  
18 to structure license agreements patterned on the fees  
19 that those users were paying ASCAP, is that correct?

20                   MR. KLEINBERG: I'll object to the form of  
21 the question.

22                   MR. RICH: Let me rephrase.

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1 I believe you testified in response to Mr.  
2 Kleinberg of at least one instance that is involving  
3 the commercial local television broadcasters, where a  
4 fee agreement was structured such that BMI, both on an  
5 interim and final basis if I am correct, would receive  
6 its license fees as a per centage of the  
7 license fees that a given television broadcaster would  
8 pay ASCAP, is that correct?

9 A Correct.

10 Q And BMI voluntarily entered into that  
11 agreement, did it not?

12 A It was not ordered.

13 When you say voluntarily, it was a process  
14 of negotiations between the parties.

15 Mr. Rich, I don't recollect who made that  
16 proposal, but yes it was agreed to by the parties, BMI  
17 and the local television industry.

18 Q And it was recommended by BMI's senior  
19 management for approval, correct, or else it would not  
20 have been executed?

21 A It must have been. I was not involved in  
22 that.

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1 Q So, to the extent that BMI was faced in  
2 1992, or according to your recollection, in 1987, with  
3 accepting license fees effectively putting it in a  
4 ratio to the fees that ASCAP had received, there was  
5 certainly ample precedent for that in the commercial  
6 sector, correct?

7 A There was precedent for it, yes.

8 Q Now, speaking of interim license fees, you  
9 testified that part of the uncertainty that BMI faced  
10 in arriving at license terms with public broadcasters,  
11 was the unsettled nature of BMI's commercial license  
12 relationships as of 1992, is that correct?

13 A No. I think I said, Mr. Rich, that that  
14 was one of the factors that mitigated against going  
15 before CRT. It was not a factor that made it  
16 difficult to assess a fee between PBS and BMI.

17 I said that if we wanted to proceed before  
18 CRT that it would be difficult under those  
19 circumstances to ask CRT to look at a commercial rate  
20 which was interim.

21 That is what I think I testified to.

22 Q Let's focus at the network television

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1 level, because your testimony embraces the view that  
2 those license fees, at least as of 1992, were interim,  
3 is that correct?

4 A I think I said, Mr. Rich, that because of  
5 most favored nations clauses in the license  
6 agreements, they had the effect of being interim.

7 All three of the agreements between ABC,  
8 CBS and NBC had most favored nations clauses. They  
9 were not finalized until ASCAP was done with its  
10 litigation with CBS and ABC.

11 As a result of that litigation between  
12 ASCAP and CBS and ABC, I think NBC dropped out of the  
13 litigation, BMI had to make adjustments in the fees  
14 that BMI received from those networks.

15 Q So, when you refer in your written  
16 testimony to the fact that BMI's license agreements  
17 with the three commercial networks were interim, I  
18 take it from your most recent answer that by interim  
19 you mean solely that they were subject to certain  
20 possible most favored nation adjustments?

21 A Yes, sir.

22 Q Which included adjustments in one or more

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1 cases keyed to the possible outcome of the ABC and  
2 CBS, ASCAP Rate Court proceedings?

3 A Yes, sir.

4 Q What was your understanding of the  
5 magnitude of the fee dispute in the ABC and CBS rate  
6 proceeding? How much separated the parties, to your  
7 knowledge?

8 A I really don't remember the magnitude, Mr.  
9 Rich.

10 Q Whatever that was, how did that  
11 uncertainty affect BMI's judgement about either the  
12 fees it could reasonable secure at the bargaining  
13 table form the public broadcasters or it might secure  
14 before the CRT?

15 A Again, it didn't have a direct influence  
16 on what we could secure from negotiations from PBS and  
17 NPR. I think, as I testified, that if we went before  
18 a CRT, the fact that these were not final in the sense  
19 that they were subject to adjustment, one could argue  
20 that they are not final and should not be considered.

21 In some BMI had to refund money and in  
22 some instances BMI did received extra money.

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1 Q Was it your impression, focusing on the  
2 ABC, CBS and NBC television networks that the  
3 magnitude of potential adjustments was in the nature  
4 of hundreds of per cent?

5 A Hundreds of per cent?

6 Q Hundreds of per cent from prior fees.

7 A A fee should go from one dollar down to  
8 zero?

9 Q No, say from \$9 million down to \$2  
10 million.

11 A I don't think it was of that magnitude.

12 Q What is your best recollection?

13 A Mr. Rich, I don't want to give you a  
14 guesstimate; I really don't remember.

15 Q Incidentally, the television networks were  
16 not in an interim fee status as you would define it,  
17 with BMI as of 1987, were they?

18 A I believe that the agreement that BMI had  
19 with the local television industry was based on a per  
20 centage of the ASCAP fee.

21 Q My question, maybe I misspoke, was  
22 directed to three licensed television networks as of

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1 1987.

2 My question was, was it not a fact that as  
3 of the time of the 1987 negotiations there really was  
4 no uncertainty as to BMI's license fee status with the  
5 ABC, CBS and NBC television networks?

6 A I don't think that is correct, Mr. Rich.

7 I remember specifically that NBC went back  
8 years of possible adjustments.

9 Q What about ABC and CBS?

10 A I would have to look at the agreements.

11 But my recollection is that NBC went back  
12 for years and years.

13 I don't remember whether there were cut-  
14 off period of times with the ABC and CBS agreements,  
15 but they had probably the most complex most favored  
16 nations provisions I have ever seen in my life.

17 I would have to look at the agreements  
18 themselves.

19 My recollection was that they were interim  
20 in nature. I know definitely that NBC was and I am  
21 almost sure all of them were.

22 Q Now, you indicated that the local

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1 television broadcasters were, in 1992, paying fees to  
2 BMI computed as a per centage of interim and  
3 ultimately final ASCAP fees, is that correct?

4 A Local stations were paying to BMI?

5 Q Yes.

6 A Correct.

7 Q What was BMI's understanding as of 1992 of  
8 its relative usage of its repertory by the local  
9 television broadcasters relative to ASCAP?

10 A In which year?

11 Q In 1992.

12 A Let me try to answer in this fashion; I  
13 don't want to give you the exact per centage because  
14 I don't remember the exact per centage.

15 But I know it had been increasing on  
16 confidential television. So much so that the  
17 agreement that BMI had with the local television  
18 industry which was based on a per centage of the ASCAP  
19 fee had been stairstepped up.

20 I think ultimately, the figure was 72 per  
21 cent with a 2 per cent adjustment, 72 or 74 per cent  
22 of the ASCAP fee.

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1 I don't remember what it was in 1992, but  
2 it certainly was greater than that.

3 Q Is it accurate that whatever the precise  
4 ratio might have been, it was significantly higher of  
5 the then prevailing ratio of BMI to ASCAP music with  
6 respect to public broadcasting?

7 A Yes.

8 Q Now on a per centage of revenue basis, how  
9 did the interim fees which the local commercial  
10 broadcasters were paying to BMI compare to those that  
11 BMI was receiving from the public broadcasters?

12 A I didn't do the calculation, Mr. Rich, and  
13 this will be purely an assumption on my part. Do you  
14 want me to assume?

15 Q If you have an educated assumption, yes.

16 A I would rather not assume; if you want me  
17 to, I will.

18 I think that the rate that was paid by  
19 public broadcasters in relation to the revenues that  
20 were generated on an industry-wide basis, namely the  
21 revenues that were generated by the local television  
22 stations like the affiliates of PBS and NPR, were a

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1 lower per centage than the commercial broadcasters.

2 Q Significantly lower?

3 A I don't know; they were lower.

4 Q What per centage did you place on the  
5 local commercial broadcasters' likelihood of success  
6 in rolling back their license fees by some 75 per  
7 cent, as of 1992?

8 A Mr. Rich, I was hopeful that they wouldn't  
9 be rolled back at all.

10 However, the fees were adjusted.

11 The magnitude that was being asked by the  
12 local television industry was enormous, about a 70 to  
13 75 per cent reduction in fees.

14 No knows what the Court was going to do.  
15 I had no idea what was going to happen.

16 As I said, I was hopeful that they would  
17 not be rolled back. It was rolled back to some extent  
18 to 1972 plus adjustments upward as decided by  
19 Magistrate Dollinger, but no knew what the result was  
20 going to be.

21 Q But we agreed --

22 A Certainly counsel representing the

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1 television industry thought that they had a pretty  
2 good chance.

3 Q But my question, and I won't touch that,  
4 my question is how you, as BMI's chief legal officer,  
5 in evaluating prospects before the CRT and otherwise,  
6 what handicapping you gave in 1992 to the prospects  
7 that interim fees that were then being paid which you  
8 have agreed were higher than those which BMI was  
9 receiving from public broadcasters would be reduced by  
10 some 75 per cent?

11 A I could answer it only in this way, Mr.  
12 Rich.

13 BMI was very concerned. We talked about  
14 this. We were very concerned that the amount of  
15 revenues that were going to be generated to BMI would  
16 be reduced significantly.

17 What would we do under those  
18 circumstances? Contingency plans were thought of for  
19 what we would have to do if the revenues were reduced  
20 by different magnitudes.

21 I can't say to you what the chances of  
22 success. As I said we were hopeful that the local

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1 television industry would not be successful.

2 Q I noticed that your testimony reports on  
3 complaints that BMI had been receiving from commercial  
4 broadcasters concerning the fee levels with the public  
5 broadcasters.

6 But I don't see any mention in your  
7 written testimony of complaints received from BMI's  
8 composers and music publishers.

9 I take it that, had you recalled such  
10 complaints as of 1992, you would have cited them in  
11 your testimony?

12 A Mr. Rich, as you are aware, I basically  
13 deal for the most part, with the licensing branch of  
14 BMI.

15 The people that I meet on the broadcast  
16 level would be relating their issues to me.

17 I do come in contact on occasion with what  
18 we call the performing rights area, the membership or  
19 the affiliate base, but not that often.

20 So, if I recollected any of these  
21 conversations, yes, certainly I would relate them.

22 But I wouldn't be in a position to hear

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1       them directly.

2               Q       You appeared as BMI's principal negotiator  
3       you testified, in 1992?

4               A       Yes.

5               Q       You were there representing the entirety  
6       of BMI's interests, is that correct?

7               A       Yes, Mr. Rich.

8               Q       At page 6 of your written testimony, you  
9       cite a series of other litigations in which BMI was  
10      involved, dating back I think to 1969, is that  
11      correct?

12              A       Yes.

13              Q       The first question, is there a reason that  
14      you omitted a series of copyright infringement suits  
15      that BMI commenced against various broadcast and cable  
16      users during this period?

17              A       Well, let me answer this.

18                      With respect to infringement suits that  
19      BMI brought against broadcasting entities, whether  
20      they be radio or television stations, under the  
21      following scenarios.

22                      One, where they were using BMI music and

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1 refused for one reason or another to take a BMI  
2 license after being advised and solicited on numerous  
3 occasions to take a BMI license.

4 If the broadcast entity continued to use  
5 BMI music we had no recourse but to commence copyright  
6 infringement litigation.

7 Q I think you are straying from my question.

8 My question was, in recounting litigations  
9 which you indicate caused BMI to be involved in  
10 numerous costly lawsuits music users, beginning as  
11 early as 1969 and as recently as 1991, is there a  
12 reason you failed to include in that list of costly  
13 lawsuits, lawsuits initiated by BMI among others  
14 against the CBS owned and operated television  
15 stations, against the Rainbow Programming Services,  
16 against Lifetime Television and against the Family  
17 Channel?

18 A No, actually there would be no problem in  
19 adding them.

20 These entities of Rainbow, Lifetime, did  
21 not have license agreements with BMI and we had no  
22 recourse if they continued to use music but to bring

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1       them into court for copyright infringement actions.

2               Q       Indeed you do cite the HBO litigation,  
3       don't you, somewhere in here?

4               A       The reason we did that --

5               Q       Could you answer me?

6               A       Yes, it is there, Mr. Rich.

7               Q       Is there a reason sir, when you cite the  
8       HBO litigation --

9                       How did that litigation begin, to your  
10       recollection?

11              A       BMI commenced an action for copyright  
12       infringement against HBO.

13              Q       Is there a reason in your testimony that  
14       that is not revealed to the Panel?

15              A       Well, I think it is basically the  
16       magnitude of the dollars that were expended. This HBO  
17       case is an example.

18                       It commenced as a copyright infringement  
19       action because there was no agreement between BMI and  
20       HBO. And as a result, BMI then faced an anti-trust  
21       defense and this is what made these litigations  
22       costly, Mr. Rich, not the fact that it was a copyright

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1 infringement action.

2 The defense raised an anti-trust question  
3 that goes to the core of BMI's existence whether it  
4 can license on a blanket basis.

5 That is why I think my written testimony  
6 was trying show the expense BMI incurred with these  
7 major anti-trust litigations.

8 Q To your knowledge, did one or more of the  
9 copyright infringement suits commenced against the  
10 cable entities that I mentioned, did one or more of  
11 those was met with an anti-trust counter point?

12 A HBO was, NCTA was, A&E actually is not  
13 here. A&E sued BMI I think. I think Lifetime sort of  
14 sat out on the sidelines.

15 Q Family Channel?

16 A Same as Lifetime.

17 Q As their counsel I will respectfully  
18 disagree with your testimony, but I am not testifying.

19 MR. KLEINBERG: Well, then, perhaps we can  
20 have that stricken from the record?

21 CHAIRPERSON GRIFFITH: It is stricken.

22 BY MR. RICH:

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1 Q Now as of the summer of 1992 when you  
2 entered into negotiations with the Public  
3 Broadcasters, how many of the matters which you chose  
4 to identify on page 6 of your testimony were still  
5 active litigations?

6 A In 1992, I believe they were all done.

7 Q Now, you indicated in several places on  
8 page 6 the costly nature of these lawsuits, yes?

9 A Yes.

10 Q What, on average, did your litigation  
11 expenses run annually when these litigations were  
12 pending?

13 A I could tell you, one sticks out of my  
14 mind, the HBO NCTA litigation. I guess over the  
15 course of the litigation, probably about \$6 million.

16 Q And what percentage --

17 A Maybe even a little greater than that.

18 Q What percentage of BMI's gross licensing  
19 income did these annual expenditures during this  
20 period of heavy legal involvement entail roughly?

21 A Less than 10 percent. However, Mr. Rich,  
22 I mean figures -- I had to do this with an economist

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1 sitting in the room, but my statement is statistics  
2 don't lie but lies use statistics. I mean you could  
3 say what is a percentage, but when you're dealing with  
4 songwriters who basically earn pennies a performance,  
5 you take away \$6 million, you take away another \$1  
6 million, it adds up and the amount of money that the  
7 affiliates get for the payments, for the performance  
8 of their music, and BMI and I can only speak for BMI,  
9 does attempt to keep overhead low. Sometimes we're  
10 forced into a situation we don't have a choice, but --  
11 to spend money for litigation, but we try to keep our  
12 overhead low.

13 So I mean it may not be a huge percentage,  
14 but it's still dollars that come out of the pockets,  
15 not of BMI, but it comes out of the pockets of the  
16 songwriters that we represent.

17 Q Now is it your sworn testimony, Mr.  
18 Berenson, that no matter by how greater a sum BMI may  
19 have perceived it was being underpaid by the Public  
20 Broadcasters in 1992 the enormous cost and perhaps  
21 other traumas and dislocations of these prior  
22 litigations, many of which BMI itself commenced, was

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1 so great that BMI would not seek redress to the CRT,  
2 if necessary. Is that your testimony?

3 A Well, my testimony is when you consider  
4 all of these factors together, it was a decision that  
5 was made by management not to proceed, not one  
6 specific item by itself, but taken into consideration  
7 all together, this is what caused management to say  
8 no, let us not do this. And in the vast scheme of  
9 things, you know, public broadcasting is not the  
10 smallest user of BMI music by any means, but it's  
11 certainly not the largest user and again taking all  
12 these other factors into consideration, a decision was  
13 made at that time let's wait and wait until another  
14 day if it becomes necessary.

15 Q I take it BMI had no similar constraint  
16 imposed by management at the time it entered into the  
17 1987 deal with Public Broadcasters, correct?

18 A Well, there was litigation that BMI was  
19 involved with. That would have been a concern, major  
20 anti-trust litigation over the years. May I look at  
21 my paper for a moment?

22 Q Please. I have in mind your statement at

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1 the top of page 7, very top.

2 (Pause.)

3 A The date you were looking at was 198 --

4 Q My question is was there a similar edict  
5 from management that had BMI determined in 1987 that  
6 the fees that were being offered were inadequate, that  
7 it could not in any circumstances repair to the CRT?

8 A I don't remember having any discussions,  
9 Mr. Rich, one way or another. But I mean -- I don't  
10 remember.

11 Q And now is the reason that BMI is  
12 presently before this Panel that the edict has been  
13 lifted by BMI management?

14 A I don't know whether the edict has been  
15 lifted, Mr. Rich, but I will say this, I negotiate for  
16 BMI. Before I came to BMI I negotiated and I have to  
17 clean this up -- just because I made a bad deal a few  
18 times in a row doesn't mean I have to continue to sit  
19 with a bad deal. I guess the decision came down when  
20 we couldn't get -- I am not going to get into  
21 settlement negotiations, but when we couldn't arrive  
22 at what we felt would be a fair and reasonable fee

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1 from Public Broadcasters, we said okay, we don't have  
2 a choice. I'd much rather not litigate with my  
3 customers, as I said before, but sometimes you don't  
4 have a choice.

5 That came upon when we said we did it over  
6 the years. It's time not to do it any more.

7 Q Is it your view that it will be less  
8 costly for BMI to litigate this proceeding in 1998  
9 than it would have been in 1992?

10 A That's not my statement.

11 Q Were you a party to the discussions you  
12 testified concerning about the circumstances under  
13 which the waiver of confidentiality for purposes of  
14 this proceeding came about?

15 A May I have the question again?

16 Q Were you a party to any of the  
17 conversations which occurred, the result of which was  
18 the waiver of the effect of the confidentiality  
19 clause?

20 A I was a party to the conversations with my  
21 counsel, with my attorneys.

22 Q My question, to sharpen it, was were you

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1 a party to any of the conversations with  
2 representatives of PBS or NPR on that subject?

3 A The specific waiver that I referred to?

4 Q Yes.

5 A No.

6 Q So your testimony is based solely on  
7 second hand reports of those discussions by your  
8 colleagues, correct?

9 A By my counsel, yes.

10 Q Now you state in your written testimony  
11 that --

12 MR. KLEINBERG: I just have a question.

13 MR. RICH: I'm right toward the end.

14 CHAIRPERSON GRIFFITH: I'm with Mr. Rich  
15 and he's on the last page.

16 (Laughter.)

17 MR. RICH: I promise, even with a few  
18 handwritten questions.

19 MR. KLEINBERG: That's all right.

20 CHAIRPERSON GRIFFITH: So we're going to  
21 try to wait it out, if you don't mind, Mr. Kleinberg.

22 MR. KLEINBERG: That's fine. I don't mind

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1 at all.

2 BY MR. RICH:

3 Q You state in your written testimony, Mr.  
4 Berenson, that radio, to use your words, was  
5 peripheral to the 1992 negotiations. Is that correct?

6 A Yes sir.

7 Q Is radio peripheral to your present fee  
8 proposal?

9 A Let me explain what I mean. Maybe what I  
10 said was misinterpreted. When we negotiated with the  
11 public broadcasting entities, NPR and PBS, basically  
12 television was used as a proxy to establish fees and  
13 to negotiate fees. That was my intent to say that it  
14 was peripheral. We didn't get into a breakout of  
15 radio and television, separately. Is that -- I'm  
16 trying to answer your question. I interpreted your  
17 question in that fashion.

18 Q When you talked about public broadcasting  
19 being under political attack, this is at page 8 --

20 A Yes sir.

21 Q You indicate that BMI was concerned that  
22 if it had gone to the CRT it might alienate its

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1 supporters in Congress, meaning BMI supporters or PBS  
2 supporters, which ones?

3 A I mean supporters of protection of  
4 intellectual property rights.

5 Q When you say it might alienate its  
6 supporters in Congress, page 8, what is the "its" a  
7 reference to?

8 A The copyright owners.

9 Q Including BMI's interests?

10 A Yes. BMI's representation of its  
11 songwriters and music publishers.

12 Q So that it was in BMI's own political  
13 interest in 1992 not to pursue a CRT, correct?

14 A BMI's political interest, or BMI's  
15 interests are the same as affiliates' interest. If we  
16 don't represent our affiliates adequately, they can  
17 leave and go to ASCAP or they can license directly.  
18 So my answer is that it was in the interest of -- we  
19 felt, of BMI which meant BMI's affiliates that we  
20 would not want to take on public broadcasting at the  
21 time it was under attack in Congress.

22 MR. RICH: I have no further questions.

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1 CHAIRPERSON GRIFFITH: All right. Ladies  
2 and gentlemen, we'll take our morning recess --

3 MR. SCHAEFFER: I have one issue. We  
4 haven't offered PBX 30 for identification into  
5 evidence. I don't know if Mr. Rich intended to do  
6 that or if that's an oversight. If not, I would ask  
7 that it be marked in evidence. We have limited enough  
8 discovery rights, subpoena rights in this proceeding  
9 and this, in my view, is a very, very important  
10 admission in public broadcasting.

11 CHAIRPERSON GRIFFITH: It's been marked  
12 for identification at this point.

13 MR. SCHAEFFER: I ask that it be accepted  
14 into evidence.

15 MR. RICH: I'm prepared to offer it. I  
16 don't know what counsel for BMI's position is.

17 MR. KLEINBERG: I have no objection to it  
18 either.

19 CHAIRPERSON GRIFFITH: It will be received  
20 as PB 30X in evidence.

21 (The document referred to,  
22 having been previously marked

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1 for identification as PB  
2 Exhibit No. 30X was received in  
3 evidence.)

4 CHAIRPERSON GRIFFITH: All right, we'll  
5 take our morning recess, about 10 or 12 minutes.

6 (Whereupon, the proceedings went off the  
7 record at 11:41 a.m. and resumed at 11:56 a.m. in  
8 Closed Session.)  
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1 CHAIRPERSON GRIFFITH: All right, the  
2 session is now open.

3 Dr. Owen, good afternoon, sir.

4 Let the record reflect that the previous  
5 -- the witness has been previously sworn and you  
6 remain under oath, sir.

7 Thank you.

8 Whereupon,

9 BRUCE OWEN  
10 was recalled as a witness, and after having been  
11 previously duly sworn, assumed the witness stand, was  
12 examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. SALZMAN:

15 Q Good afternoon, Dr. Owen.

16 A Good afternoon.

17 Q Would you just very quickly remind the  
18 Panel of what you do for a living?

19 A I'm an economist.

20 Q And following your testimony in this case  
21 previously, what -- were you asked to do anything  
22 further in this matter with respect to music usage?

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1 A Yes.

2 Q Can you tell us in summary what that was?

3 A BMI asked us to compute BMI's share of  
4 music usage on public broadcasting on PBS, I should  
5 say, using Dr. Jaffe's data and Dr. Jaffe's  
6 methodology.

7 Q Did you make any attempt to verify whether  
8 Dr. Jaffe's data themselves were correct?

9 A No.

10 Q Did you make any judgements as to whether  
11 Dr. Jaffe's methodology was correct?

12 A No.

13 Q So what did you do with Dr. Jaffe's data  
14 to add to the study that he already provided?

15 A Dr. Jaffe, in the first did round, did not  
16 use his data to compute shares of music usage for BMI  
17 and ASCAP and SESAC, and we used his data to produce  
18 that information.

19 Q What was your understanding as to what  
20 data Dr. Jaffe did use to make this study?

21 A He based his study on data from PBS  
22 showing for the PBS feed what programs were aired --

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1 that is to say provided to the stations -- and the cue  
2 sheet information related to those programs.

3 Q The cue sheet data that you understand he  
4 used and what you used, did that cue sheet data  
5 contain information as to whether particular writers  
6 were affiliated with BMI as against ASCAP or other?

7 A Yes.

8 Q And was it that data that you used to  
9 prepare your new study?

10 A Yes.

11 Q And were you able, in going through Dr.  
12 Jaffe's data, to reproduce the results that he had  
13 come to by following the instructions laid out by him  
14 in his testimony?

15 A Yes, we used his methodology. And to  
16 check that we were doing it appropriately, we were  
17 able to reproduce his results within a very small  
18 margin of error.

19 Q And what were the results of the study  
20 that you performed?

21 A The results of the study are on page three  
22 of my written testimony.

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1 Q Okay, let's turn to that then, please.

2 A And the table there shows for each of the  
3 five years, 1992 through 1996, the share of the PBS  
4 feed devoted to music from BMI, ASCAP and SESAC  
5 respectively.

6 Q Now if I read correctly, for 1992 we show  
7 42.9% for BMI and then there are other numbers that  
8 vary from that down and up. Is there any  
9 statistically significant trend in those numbers up or  
10 down?

11 A No.

12 Q Now did you have occasion to look at Dr.  
13 Jaffe's rebuttal testimony insofar as it concerned  
14 adding new data to his database for music usage?

15 A Yes.

16 Q And what did you see? In what ways did  
17 Dr. Jaffe add to his database for his rebuttal  
18 testimony?

19 A He augmented his original database by  
20 including additional information for 1992 --  
21 additional cue sheets which affected also some  
22 subsequent years.

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1 Q How did they affect the subsequent years,  
2 to your understanding?

3 A They permitted the identification of the  
4 source of the music in subsequent years.

5 Q And using that additional data from Dr.  
6 Jaffe, did you recompute the BMI share for those five  
7 years?

8 A Yes.

9 Q Okay. I'd like to show you a new trial  
10 exhibit for BMI.

11 CHAIRPERSON GRIFFITH: All right, it will  
12 be marked as BMI Exhibit 4. Hearing Exhibit 4.

13 (Whereupon, the above-mentioned  
14 document was marked as BMI  
15 Hearing Exhibit No. 4 for  
16 identification.)

17 BY MR. SALZMAN:

18 Q Can you identify BMI Hearing Exhibit 4?

19 A Yes, this is the result of our  
20 recalculation of the shares for BMI based on Dr.  
21 Jaffe's revised data.

22 Q And is there any statistically significant

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1 trend in these data?

2 A No.

3 Q And there's a -- the last line on the page  
4 says "BMI's average share over five year period 1992  
5 to 1996." What does that represent?

6 A It's the simple arithmetical average of  
7 the five years.

8 Q Finally, Dr. Owen, in the course of his  
9 rebuttal testimony as written, Dr. Jaffe at one point,  
10 I believe at page 20, drew attention to the difference  
11 between the programming expenditures of local  
12 television as against networks and compared those to  
13 the license fees paid by those two groups to BMI.

14 MR. RICH: May I just ask again what  
15 you're referring to?

16 MR. SALZMAN: It's at page 20 of Dr.  
17 Jaffe's rebuttal.

18 MR. RICH: Thank you.

19 BY MR. SALZMAN:

20 Q In your opinion, does the fact that local  
21 television stations pay a different fraction from  
22 commercial networks to BMI are a different proportion

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1 of their programming expenditure, does that impact  
2 your view that programming expenditures on the  
3 commercial side are one appropriate benchmark for how  
4 much the fees ought to be paid by the public  
5 broadcasters?

6 A No, that doesn't change my opinion about  
7 that.

8 Q Okay, can you explain why?

9 A To compare stations to networks is to  
10 compare apples and oranges from the point of view of  
11 the estimation method that I put forward in my first  
12 round testimony.

13 I was comparing the ratio of payments to  
14 BMI to program expenditures on the commercial side for  
15 the whole industry, stations and networks combined, to  
16 the fee which was to apply to public broadcasting to  
17 television and radio effectively on the protesting  
18 side for the whole industry.

19 There's no reason to suppose that the  
20 ratio of royalty payments to program expenditures  
21 should be the same for networks and for stations.  
22 There are all kinds of complicated differences between

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1 those two entities.

2 MR. SALZMAN: No further questions.

3 JUDGE GULIN: Mr. Salzman, were you  
4 offering --

5 MR. SALZMAN: Excuse me, I do offer BMI  
6 Hearing Exhibit 4.

7 CHAIRPERSON GRIFFITH: Any objection to  
8 BMI Exhibit 4?

9 MR. SALZMAN: Hearing Exhibit 4.

10 CHAIRPERSON GRIFFITH: Hearing Exhibit 4.

11 MR. RICH: If I may have a moment.

12 CHAIRPERSON GRIFFITH: All right.

13 MR. RICH: Your Honors, subject to --  
14 again, since we have not seen this until now, our  
15 economist's ability to verify the accuracy of the  
16 computations it reflects which, by definition, we  
17 can't do sitting here, we have no objection to the  
18 exhibit.

19 CHAIRPERSON GRIFFITH: All right, it will  
20 be admitted at this time. And once again, reserving  
21 to you the right to file a motion to have it  
22 withdrawn.

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1 Do you want to cross examine?

2 (Whereupon, the above-mentioned  
3 document, previously marked as  
4 BMI Hearing Exhibit 4 for  
5 identification, was received in  
6 evidence.)

7 MR. RICH: I have only, I think, one  
8 question on cross examination which relates to this  
9 latest exhibit.

10 CROSS EXAMINATION

11 BY MR. RICH:

12 Q Am I correct, Dr. Owen, that properly  
13 titled this document should reflect the fact that this  
14 reflects BMI's shares measured in minutes as did your  
15 other --

16 A Yes.

17 Q -- chart? It's not so labeled. I just  
18 want the record to be clear.

19 A It is minutes.

20 MR. KLEINBERG: I have no further  
21 questions.

22 CHAIRPERSON GRIFFITH: Any other

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1 questions?

2 Dr. Owen, I simply want to know that when  
3 you average something, is 50% always below and 50%  
4 always above?

5 (Laughter.)

6 THE WITNESS: Almost always.

7 (Laughter.)

8 CHAIRPERSON GRIFFITH: Thank you very  
9 much, sir.

10 Oh, wait, wait.

11 THE WITNESS: I'm sorry.

12 CHAIRPERSON GRIFFITH: Judge Dreyfus has  
13 a question apparently. Sorry about that.

14 JUDGE DREYFUS: Yes, on page three of your  
15 rebuttal testimony, --

16 THE WITNESS: Yes.

17 JUDGE DREYFUS: -- can you give us some  
18 idea of the plus or minus accuracy of these numbers?  
19 Let me premise that with another point.

20 It's my understanding that Dr. Jaffe's  
21 analysis was done on some 100 to 200,000 minutes, and  
22 your -- I think your analysis was done in your direct

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1 testimony on 34 million minutes?

2 THE WITNESS: The BMI database has that  
3 much; yes, sir.

4 JUDGE DREYFUS: So given that, what is the  
5 plus and minus accuracy of page three?

6 THE WITNESS: This is based on Dr. Jaffe's  
7 data, and I did not examine that data as to its  
8 accuracy or its variance or any other statistical  
9 attribute. I have no opinion as to how accurate it is  
10 in any dimension.

11 JUDGE DREYFUS: Okay.

12 CHAIRPERSON GRIFFITH: All right, Dr. --  
13 I'm sorry.

14 MR. SALZMAN: I'm sorry. Before Dr. Owen  
15 goes, I think in light of who the parties are in this  
16 case and in light of Judge Griffith's question about  
17 averages, it does bear noting that, on National Public  
18 Radio, at Lake Woebegone, all the children are above  
19 average.

20 (Laughter.)

21 CHAIRPERSON GRIFFITH: Thank you.

22 Dr. Owen, thank you very, very much.

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1 You're free to go.

2 (The witness was excused.)

3 Mr. Salzman, that was very good. I have  
4 to remember that.

5 All right.

6 MR. KLEINBERG: At this point, BMI rests  
7 its rebuttal case.

8 CHAIRPERSON GRIFFITH: Thank you very  
9 much, sir.

10 All right, Mr. Rich.

11 MR. RICH: With the Panel's permission,  
12 I'd like to propose the following schedule, if we may.  
13 We'd like to present next as our first rebuttal  
14 witness Paula Jameson, whom we expect to be relatively  
15 brief.

16 CHAIRPERSON GRIFFITH: Yes.

17 MR. RICH: And again, with the Panel's  
18 consent, we would like to defer putting on our last  
19 witness, who I expect will be somewhat longer on the  
20 stand, Professor Jaffe, until first thing in the  
21 morning.

22 CHAIRPERSON GRIFFITH: All right.

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1 MR. RICH: If that's agreeable.

2 CHAIRPERSON GRIFFITH: Is that agreeable  
3 with you?

4 MR. KLEINBERG: Can we start it tomorrow  
5 maybe at 9:30 if that's good just so we get a full day  
6 in and hopefully don't go over?

7 MR. RICH: It's agreeable with us.

8 MR. KLEINBERG: Phil?

9 MR. SCHAEFFER: I'm --

10 JUDGE DREYFUS: Do we anticipate a Friday  
11 schedule?

12 MR. RICH: Hopefully not.

13 MR. SCHAEFFER: I wouldn't swear. I mean,  
14 who knows? We've been running much longer than  
15 everybody thought. We've been running long.

16 CHAIRPERSON GRIFFITH: Okay.

17 MR. KLEINBERG: It's my goal that we will  
18 try and finish tomorrow so we won't have to come back  
19 Friday, to the extent that goals matter.

20 CHAIRPERSON GRIFFITH: I always have to do  
21 one thing at a time; so, first of all, we will start  
22 tomorrow morning at 9:30 a.m. irrespective of when we

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1 adjourn today.

2 Secondly, now I understand that we  
3 anticipate -- or are cautiously optimistic that we  
4 will conclude tomorrow.

5 All right, do you want to call Ms.  
6 Jameson?

7 MR. RICH: Thank you. We would call Paula  
8 Jameson to the stand.

9 CHAIRPERSON GRIFFITH: Ms. Jameson, if  
10 you'll come forward please, ma'am.

11 All right, let the record reflect, please,  
12 that the witness has been previously sworn and she  
13 remains under oath.

14 Thank you.

15 Whereupon,

16 PAULA JAMESON  
17 was recalled as a witness, and after having been  
18 previously duly sworn, assumed the witness stand, was  
19 examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. RICH:

22 Q Good afternoon, Ms. Jameson.

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1                   On or about the 14th of April of 1998 you  
2 submitted rebuttal testimony in this -- written  
3 rebuttal testimony in this matter, is that correct?

4                   A       I did.

5                   Q       I'm going to briefly ask you to summarize  
6 the content of that. But first, just to refresh the  
7 Panel's recollection, would you indicate again during  
8 the period -- the role you played on behalf of PBS  
9 during the 1987 and 1992 license negotiations with  
10 ASCAP and BMI as testified to earlier in your direct  
11 testimony?

12                  A       As I've said earlier, I was the general  
13 counsel of the Public Broadcasting Service during  
14 those years. And all the negotiations with respect to  
15 the music -- the performing rights licenses were done  
16 out of my office.

17                   And I either -- in 1987 I participated in  
18 some of the meetings. In '92 I participated in more  
19 of the negotiation sessions. But ultimately, in those  
20 years, as well as last year, those activities -- I was  
21 responsible for managing all of those activities.

22                  Q       Now since the filing of your written

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1 direct testimony, that is your original testimony in  
2 this matter, have you had occasion to review that  
3 portion of ASCAP's direct and now rebuttal cases which  
4 pertain to the no precedential value language which  
5 appears in the various license agreements entered into  
6 between the public broadcasters and ASCAP?

7 A I'm familiar with the case -- the  
8 testimony filed in this case by those witnesses.

9 Q And what is your recollection of the  
10 discussions, if any, which took place between the  
11 parties in either 1987 or 1992 concerning the notion  
12 that the resulting agreement between the public  
13 broadcasters and ASCAP would be of no precedential  
14 value?

15 MR. SCHAEFFER: I'm going to object  
16 because the only testimony was of Mr. David's and had  
17 nothing to do with Ms. Jameson. So I don't know what  
18 -- we're now bringing in new material.

19 MR. RICH: I haven't -- if you'd care for  
20 me to respond, I have no idea what Mr. Schaeffer's  
21 referring to. This is her testimony on rebuttal.  
22 This is about the summary.

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1 MR. SCHAEFFER: I withdraw the objection.  
2 I'm sorry.

3 I misunderstood what you were asking, Mr.  
4 Rich.

5 CHAIRPERSON GRIFFITH: Thank you.

6 THE WITNESS: The best of my recollection,  
7 neither in the '87 negotiations nor in the '92  
8 negotiations was this particular provision of the  
9 agreement ever discussed.

10 BY MR. RICH:

11 Q What is your recollection of the degree to  
12 which either the language or the substance of what  
13 came to be paragraph 3(b) of the 1987 and 1992  
14 licenses -- and I'll represent that paragraph 3(b) is  
15 the clause incorporating the no precedential language.

16 What is your recollection of the degree to  
17 which either the language or the substance of  
18 paragraph 3(b) was a topic of discussion between the  
19 parties in connection with the drafting of the  
20 licenses themselves?

21 A Again, I don't believe it was ever raised  
22 in any part of the negotiations, nor during the

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1 drafting process.

2 Q What is your best understanding of why  
3 paragraph 3(b) exists in the 1987 and the 1992 license  
4 agreements?

5 A Well, it's my understanding that it -- the  
6 provision was first inserted in the agreement that was  
7 reached in 1982. I was not party to those  
8 negotiations at that time.

9 I think the provision is simply a  
10 boilerplate provision in the agreement that carried  
11 forward without any further conversation between the  
12 parties.

13 Q Now I'm going to show you -- I'm going to  
14 read to you and then show you a paragraph appearing in  
15 Mr. David's rebuttal testimony at page nine. It's one  
16 paragraph. And I'm going to ask you to comment on it.

17 Do you have it in front of you actually?

18 A I do.

19 Q Okay. And the paragraph is the bottom  
20 paragraph on page nine which reads as follows:

21 Following a series of reported interests  
22 on ASCAP, it says, quote, "As a result, ASCAP did not

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1 press for what its management and board of directors  
2 believed to be the full value to public broadcasters  
3 of the ASCAP blanket licenses extended to them or seek  
4 to drain ASCAP's resources further by litigating  
5 before the CRT."

6 "This attitude was, I am informed, not  
7 concealed from the representatives of public  
8 broadcasters."

9 Do you see that?

10 A I do.

11 Q Do you have a reaction to that statement  
12 -- those statements?

13 A Obviously I can't comment on what ASCAP  
14 and its management and its board of directors might  
15 have been thinking, but, I mean, I think it's fair to  
16 say that in all of these negotiations ASCAP has always  
17 maintained that they weren't getting enough money from  
18 the public broadcasters under these licenses.

19 But -- so, to that extent, there certainly  
20 was a conversation that they didn't believe they were  
21 getting enough money from us, that they wanted more.  
22 I mean, that was the purpose of the negotiations from

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1 their vantage point was to try to get as much as they  
2 could.

3 Q And the purpose from your vantage point?

4 A Well, my -- I think ultimately what we  
5 were interested in was reaching an agreement that we  
6 believed was reasonable to public broadcasters as well  
7 as to ASCAP to pay them fair value for the right to  
8 perform their composers' music in public broadcasting  
9 broadcasts.

10 Q And was it your impression at the  
11 conclusion of the 1987 and 1992 negotiations that, in  
12 fact, fair value had been achieved for both sides?

13 MR. SCHAEFFER: Objection. That's not in  
14 the record in the rebuttal testimony.

15 MR. RICH: If --

16 CHAIRPERSON GRIFFITH: The objection is  
17 sustained.

18 MR. RICH: Your Honors, if I may,  
19 considerable latitude was given to my friends on the  
20 other side on the theory that you've got to close the  
21 circle at some point.

22 I'm asking her to respond to Mr. David at

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1 this point on rebuttal.

2 CHAIRPERSON GRIFFITH: And you're asking  
3 her for her personal opinion?

4 MR. RICH: Indeed, just following on her  
5 last answer whether, in her view, unlike Mr. David's  
6 characterization that fair value wasn't achieved,  
7 whether it was the public broadcasters' impression  
8 that fair value was achieved.

9 MR. SCHAEFFER: There's no evidence that  
10 she has -- David is a member of the board of directors  
11 of the licensing organization that looked at fair  
12 value market. I mean, this is a lawyer who appears  
13 once every five years on this issue.

14 She certainly is in no position to opine  
15 on the fair value.

16 CHAIRPERSON GRIFFITH: All right, the  
17 objection is overruled.

18 THE WITNESS: These negotiations were not  
19 unlike business negotiations in many different arenas.  
20 There was a lot of back and forth on all sides. I  
21 think we all gave some, we all got some.

22 And my feeling was indeed we reached an

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1 accord that all the parties felt was fair or we  
2 wouldn't have reached agreement.

3 MR. RICH: I'm going to place --

4 MR. SCHAEFFER: I move to strike that  
5 answer, please.

6 CHAIRPERSON GRIFFITH: Non-responsive?

7 MR. SCHAEFFER: Yes, it goes on. He asked  
8 -- she was supposed to say yes or no. She went on  
9 with a long --

10 CHAIRPERSON GRIFFITH: The motion's  
11 denied.

12 BY MR. RICH:

13 Q I'm going to place before you a document  
14 which is already in evidence, PB-30X, and ask you a  
15 few questions prompted by the Panel during prior  
16 testimony, Ms. Jameson.

17 That is, for the Panel's information, the  
18 minutes of the July 9, 1992 negotiating session.

19 Do you recognize this document?

20 A I do.

21 Q Can you identify it for the Panel, please?

22 A These were -- this is a transcription, I

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1 guess, of notes taken by Louise Lynch, who was then  
2 assistant general counsel of PBS and who attended this  
3 first negotiation session with BMI, as did I.

4 Q And did she prepare these notes under your  
5 direction or anyone else's direction?

6 A She did, she did.

7 Q And was it the normal practice of PBS in  
8 connection with these negotiations to have someone  
9 such as Ms. Lynch who attended the negotiations  
10 prepare contemporaneous notes?

11 A It was at this meeting and at some of the  
12 other negotiation sessions. I can't say we did it at  
13 every single session, but we certainly did it at this  
14 session.

15 Q And to your knowledge and in your  
16 experience, was Ms. Lynch faithful in accurately  
17 recording the substance of the meetings for which she  
18 took notes and recorded notes?

19 A A very fine lawyer. I wish she still  
20 worked with me.

21 Q The answer to that is yes?

22 A Yes, indeed.

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1 MR. RICH: I have no further questions.

2 CHAIRPERSON GRIFFITH: All right.

3 MR. SCHAEFFER: Can we take a short break?

4 I just want to get my documents in order so I can --  
5 well, maybe we should take our break now.

6 CHAIRPERSON GRIFFITH: All right.

7 MR. SCHAEFFER: I need five minutes just  
8 to get ready.

9 CHAIRPERSON GRIFFITH: We'll take a brief  
10 recess.

11 (Whereupon, the foregoing matter went off  
12 the record at 3:07 p.m. and went back on  
13 the record at 3:15 p.m.)

14 CROSS EXAMINATION

15 BY MR. SCHAEFFER:

16 Q Ms. Jameson, I think you'll be able to  
17 hear me even from this part of the room.

18 I want to address a sentence that appears  
19 at page three of your direct testimony -- on your  
20 rebuttal testimony, I should say -- which reads "My  
21 impression of paragraph 3(b) both then and now is that  
22 it represented a boilerplate carried over from an

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1 earlier agreement, the 1982 license, the reasons  
2 perhaps significant to one or both parties at that  
3 time, but have no consequence as of the time of the  
4 1987 or 1992 negotiations."

5 You still stand by that statement?

6 MR. RICH: I object. He's misread the  
7 statement.

8 MR. SCHAEFFER: And how have I misread it?

9 MR. RICH: You left out the words "to the  
10 negotiators" right in the middle of it.

11 BY MR. SCHAEFFER:

12 Q Okay, then with that amendment and the  
13 document in front of you -- first of all, the word  
14 impression, was that designed to mean something less  
15 than recollection?

16 A No, I think it means recollection and  
17 impression. It means both.

18 Q Well, what do you mean by impression?

19 A I mean, I can get you a dictionary if  
20 you'd like that, Mr. Schaeffer.

21 Q No, I want your definition, please.

22 A But I just said to you my recollection is

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1 that my impression from those negotiations is that the  
2 provision was simply a -- it was in the agreement  
3 since 1982. It was not a subject of negotiations in  
4 either '87 or '92 and it carried forward.

5 The only provisions that basically  
6 changed, as I recollect, in that agreement was what we  
7 paid.

8 Q Well, you have in front of you -- and so  
9 you don't -- your definition of observation means  
10 what?

11 A It's my recollection -- and impression is  
12 also recollection. It's the same here.

13 Q So you're using now impression as  
14 recollection?

15 MR. RICH: Objection; asked and answered  
16 three times.

17 MR. SCHAEFFER: No, I think I'm entitled  
18 to explore on this.

19 CHAIRPERSON GRIFFITH: Go ahead and  
20 explain it to him one more time.

21 THE WITNESS: Okay.

22 BY MR. SCHAEFFER:

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1           Q       What does impression mean as opposed to  
2       recollection?

3           A       What I -- what this sentence says is that  
4       paragraph 3(b) was in the agreement in 1982. In 1987  
5       and in 1992, when we were able to reach a negotiated  
6       agreement with ASCAP, that provision was not the  
7       subject of any conversations at the negotiation table.

8                   And, to the best of my recollection, it  
9       was not the subject of discussion during the drafting  
10      process. And ergo, it simply stayed in the agreement  
11      as it had been since 1982.

12          Q       Would you turn -- you have in front of you  
13      PBS Exhibit 13, which is the 1992 license; Exhibit  
14      12, which is the 1988 license; and Exhibit 11, which  
15      is the 1982 license.

16          A       Okay, I'm going to get --

17          Q       And I think all the arbitrators have it in  
18      front of them as well.

19          A       Thirteen is the 19 --

20          Q       '92.

21                   Would you turn, please, to page four of  
22      Exhibit 12, page four of Exhibit 11, and page four of

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1 Exhibit 13?

2 A Okay, let's see.

3 Q Now would you look, please, at paragraph  
4 3(b) in the 1982 license.

5 A Yes, I see it.

6 Q And look at paragraph 3(b) in the 1987  
7 license.

8 A I see it.

9 Q Do you see anything different in 3(b) in  
10 the 1982 license and 3(b) in the 1987 license?

11 A I do.

12 Q What differences do you see?

13 A Apparently in 1987 two sentences were  
14 added to that provision.

15 Q And do you know who requested those two  
16 sentences to be added?

17 A I do not know.

18 Q Do you know why they were added?

19 A Let me read them. Let's see if that  
20 refreshes my recollection.

21 Q Well, I want your recollection. We can --  
22 if it's just you're going to read it back to me, don't

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1       bother.   But --

2           A       That wasn't my sense.

3           Q       -- see if it refreshes your recollection.

4           A       Thank you.   That's what I intended to do.

5           Q       If you don't know, don't guess.

6           A       No, in all honesty -- I mean, I can see  
7       what it says, but I --

8           Q       You have no recollection?

9           A       Right.

10          Q       You participated in the 1987 negotiations,  
11       didn't you?

12          A       As I said earlier, I attended a few of the  
13       meetings, but not all of them.

14          Q       So you may not have been party to all of  
15       at least the conversations in the 1987 negotiations  
16       dealing with 3(b), isn't that correct?

17          A       That is correct.

18          Q       Now would you turn to -- referring to  
19       Exhibit 12 in front of you, you'll find a letter dated  
20       October 5, 1987.  It should be attached to everybody's  
21       Exhibit 12.

22                   Do you see that?

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1 A I do.

2 Q Now do you see that that's a letter from  
3 Mr. Korman to Public Broadcasting and National Public  
4 Radio?

5 A I do.

6 Q And that's part of the license, I will  
7 represent to you, and I don't think there's any  
8 dispute because the copies have been produced by  
9 public broadcasters and include that.

10 Would you look at the second paragraph of  
11 that letter reading "ASCAP, PBS, NPR agree that the  
12 fact that the provisions of the agreement regarding  
13 license fees are being made public and are not being  
14 kept confidential will have no precedential value in  
15 any future negotiations between ASCAP, PBS and NPR."

16 Do you see that?

17 A I do.

18 Q Do you have any recollection of the  
19 reasons for that paragraph being in there?

20 A I don't.

21 Q Would you agree that that paragraph is  
22 nowhere present in the 1982 agreement?

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1                   Why don't you look at it. That is Exhibit  
2                   11.

3                   A       From this quick reading of the 1982  
4                   agreement, I don't see a comparable provision other  
5                   than the 3(b) provision that's in the '87 agreement.

6                   Q       I'm sure if it's somewhere lurking in the  
7                   five or six pages of Exhibit 11, then I'm sure Mr. --  
8                   I'm sure your counsel will tell us.

9                   MR. RICH: Objection.

10                  MR. SCHAEFFER: I didn't find it anywhere.

11                  MR. RICH: Objection.

12                  MR. SCHAEFFER: Now let me ask you --

13                  THE WITNESS: Wait a minute, wait a  
14                  minute.

15                  CHAIRPERSON GRIFFITH: Just a moment,  
16                  please.

17                  MR. RICH: I have an objection pending,  
18                  sir.

19                  MR. SCHAEFFER: What's your objection?

20                  CHAIRPERSON GRIFFITH: Do you want to  
21                  state it for the record?

22                  MR. RICH: Well, he's testifying about

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1 things lurking and counsel will find it. It's totally  
2 inappropriate. I move to strike that.

3 MR. SCHAEFFER: I withdraw the question.

4 CHAIRPERSON GRIFFITH: Thank you.

5 THE WITNESS: Mr. Schaeffer, could you --  
6 once again, ask me the question you just asked me  
7 because I've -- were you asking me whether or not the  
8 '82 -- '87 agreement had a provision -- humm, ask me  
9 the question again. I'm sorry.

10 BY MR. SCHAEFFER:

11 Q The question I have asked you is, the  
12 language that appears on the letter of October 5th  
13 from Mr. Korman to Public Broadcasting and National  
14 Public Radio, the second paragraph I've read to you  
15 had a --

16 A Right.

17 Q -- provision saying that, in effect, the  
18 agreement regarding license fees not being made public  
19 --

20 A Right.

21 Q Well, you've been reading for yourself.

22 A Okay.

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1 Q I've asked you if an analog of that second  
2 paragraph appears anywhere in the 1982 license which  
3 is Exhibit 11?

4 A Right. I didn't find it.

5 Q Thank you. Now I've also got another  
6 question for you. I notice in Mr. Korman's letter to  
7 Public Broadcasting and National Public Radio the  
8 salutation appears "Dear Friends."

9 Do you see that?

10 A I do.

11 Q Does that seem to you a common salutation  
12 in business practice?

13 A Sometimes. Just depends.

14 Q When is it used, if it is used sometimes,  
15 in your experience?

16 A Mr. Schaeffer, I mean, I don't know how  
17 you expect me to answer that. But I would say that I  
18 certainly have relationships with adversaries that are  
19 people who are sometimes on -- taken the adversarial  
20 point compared to where I am or my client is, but they  
21 are still friends.

22 Q Would it be fair to say that your

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1 experience with public broadcasting at least in its  
2 dealings with ASCAP, you regarded ASCAP, generally  
3 speaking, as friendly adversaries? Would that be  
4 fair?

5 A I'd say that's fair. At least I'd say  
6 that -- I'd say that's fair, yeah.

7 Q Would it be fair also to say that, in the  
8 context of ASCAP and PBS's relationships, you wouldn't  
9 expect ASCAP to be more avaricious toward PBS than it  
10 would be toward anybody else; wouldn't that be a fair  
11 comment?

12 A I'm not quite sure how to answer that.

13 Q Well, if you don't have the answer then  
14 say so.

15 A I mean, as I said earlier, I think the  
16 negotiations between the public broadcasting community  
17 and ASCAP have been respectful, sometimes friendly and  
18 sometimes very difficult.

19 Q And you were not a signatory to the 1987  
20 license, were you?

21 A No, as I -- I think it was -- Christianson  
22 has signed that agreement.

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1 Q Can you -- I couldn't make out the  
2 language and it would be helpful for another reason to  
3 know.

4 A It's Bruce L. Christianson who was then  
5 the president of PBS.

6 Q And who was the person who appears with  
7 NPR?

8 A Sydney Brown, who was the chief financial  
9 officer for National Public Radio.

10 Q Now you reviewed this license, the 1987  
11 license, before it was signed, didn't you?

12 A It was reviewed under my supervision.

13 Q Well, do you recall if you looked at it?

14 A I don't recall whether I read it letter  
15 for letter.

16 Q Did another lawyer at PBS look at this?

17 A Yes, indeed; yes, indeed.

18 Q Who was that?

19 A The '87 negotiations, that team was led by  
20 Jacqueline Weiss and Gwen Wood. Jacqueline Weiss was  
21 the, I think, deputy -- either -- I can't remember if  
22 she was -- I think she was deputy general counsel, and

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1 Gwen Wood was the director of copyright.

2 Q Do you know if those counsel had dealings  
3 with ASCAP's counsel about the text of the license and  
4 the letter from Korman to Public Broadcasting and  
5 National Public Radio which is attached?

6 A Yes. And in addition, we also had outside  
7 counsel.

8 Q Who was the outside counsel?

9 A A gentleman by the name of David Lloyd who  
10 was at Arnold & Porter, since deceased.

11 Q And presumably he reviewed this document  
12 as well?

13 A No doubt about it.

14 Q Would it be fair to say that, having had  
15 so much review of this document by your -- the people  
16 who were on your staff and by outside counsel, that  
17 you didn't necessarily pay a lot of attention to the  
18 details of it? Would that be fair?

19 A Well, I think what I would say is that I  
20 have a lot of confidence in the people who were  
21 conducting those negotiations, and they were reporting  
22 to me regularly on the negotiations. And I think I

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1 was paying sufficient attention to it.

2 But I did rely on --

3 Q Incidentally, with respect to the latest  
4 license, Exhibit 13, who drafted that?

5 A Exhibit 13.

6 Q The 1992 license.

7 A Who drafted any of these documents? I  
8 mean, many of them are verbatim from what they were in  
9 previous years. I can't tell you specifically who  
10 drafted it.

11 Q Well, I take your point that many of them  
12 -- I'm sorry, you don't know who drafted them?

13 A With respect to the -- I'm sorry, the 1992  
14 agreement and the others. I can't say who took the  
15 first stab at drafting the document.

16 Q Did somebody in your staff have the  
17 responsibility for the text of the 1992 license?

18 A Indeed.

19 Q Who was that?

20 A There was an attorney by the name of  
21 Sharon Sangor.

22 Q And did that counsel make contact with

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1 ASCAP's counsel in the drafting of the 1992 license?

2 A Both Sharon did, as well as outside  
3 counsel from Weil, Gotshal.

4 Q And so Weil, Gotshal was involved in the  
5 review of the 1992 license?

6 A They were.

7 Q Would it be fair to say again that you  
8 have considerable confidence both in Weil, Gotshal and  
9 the other people on your staff, so you might not have  
10 paid as much attention as you otherwise would to the  
11 text of these licenses?

12 A Mr. Schaeffer, I was very involved in the  
13 '92 negotiations. One of the differences between '87  
14 and '92 was that Jackie Weiss and Gwen Wood had  
15 participated in these music licensing negotiations  
16 several times, so they were very experienced with the  
17 whole area of music and with these negotiations in  
18 particular.

19 And I did rely -- and I was fairly new to  
20 PBS at that time. I had been there about a year when  
21 -- a little more than a year when the negotiations  
22 began in '97.

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1 In '92 Jackie Weiss and Gwen Wood were  
2 still at PBS, but in different roles. So I had a very  
3 new staff who knew very little about this area, so I  
4 was much more involved in the negotiations themselves.  
5 And I'm not going to say I drafted the agreements  
6 because that's not true, but I was much more involved.

7 Q I notice that paragraph 2(a) in both  
8 Exhibit 12 and Exhibit 13 are identical. Do you see  
9 that? It's on page three of both.

10 A They seem to be identical. It looks like  
11 --

12 Q Would you characterize these as --

13 A -- the whole page may be identical.

14 Q Take your time.

15 A It does look like the entire page is the  
16 same from agreement to agreement.

17 Q Would you expect that paragraph 2(a) is  
18 not enforceable --

19 A Let's see, 2(a).

20 Q -- because it was carried over from the  
21 1987 agreement to the 1992 agreement?

22 A Enforceable?

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1 Q Yes, enforceable.

2 A No, it's an agreement that was signed and,  
3 during its term, it's viable.

4 Q Well, wouldn't you expect if there was a  
5 violation of paragraph 2(a) during either license  
6 period that provision could be enforced by the party  
7 who sought to enforce it?

8 A Indeed.

9 Q And do you characterize 2(a) as  
10 boilerplate? After all, it's carried over from one  
11 contract to the other.

12 A Many of the provisions in this agreement  
13 were carried forward. I mean, my statement when I  
14 said boilerplate was that, to the best of my  
15 recollection, and evidently I was wrong with respect  
16 to '87, is that it was not a subject of conversation  
17 during the negotiations that I participated at.

18 Q Well, as counsel for PBS and now as a  
19 partner in a very respected law firm -- in one of the  
20 most respected law firms in the United States,  
21 wouldn't you agree the mere fact that the texts are  
22 identical in the two licenses have nothing to do with

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1 the fact that they should be enforced by a Tribunal?

2 A I don't disagree with that, but it does  
3 indicate that they carried forward from agreement to  
4 agreement.

5 Q Well, also didn't they carry forward in  
6 paragraph five and in paragraph one?

7 A In any other paragraph that was unchanged,  
8 they were not an issue during the negotiations.

9 Q And that wouldn't make them the slightest  
10 degree less enforceable, would it?

11 A No, it wouldn't.

12 Q Now you have a paragraph though in each of  
13 them, I believe -- paragraph eight at page seven of  
14 both the 1987 and the 1992 agreement which says when  
15 things are not enforceable, doesn't it?

16 Paragraph eight. It's page six on the  
17 1992 license and page seven on the 1987 license. Do  
18 you see paragraph eight?

19 A The waiver and modification provision?

20 Q Yeah. That's a boilerplate provision,  
21 isn't it?

22 A So it seems.

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1           Q       Now you would agree that there the parties  
2 specifically provided when a contractual term would  
3 not be enforced -- that is, when it was oral, not  
4 written; isn't that correct?

5           A       It says the agreement may not be changed,  
6 modified or terminated orally.

7           Q       And it also says no waiver or modification  
8 thereof shall be valid. So the parties wanted to  
9 provide, did they not, that once some portion of their  
10 agreements or arrangements couldn't be enforced, they  
11 knew how to write that, didn't they?

12           MR. RICH: I'll object to this line of  
13 questioning. There has been no testimony by this  
14 witness at any time, including in her rebuttal case,  
15 to the effect that paragraph 3(b) is not enforceable.  
16 This is a construct of Mr. Schaeffer's invention and  
17 we're wasting a ton of time on it.

18           CHAIRPERSON GRIFFITH: Mr. Schaeffer, do  
19 you have any --

20           MR. SCHAEFFER: Yes, if Mr. Rich will  
21 stipulate that paragraph 3(b) of the 1991 license  
22 agreement is to be enforced by this Tribunal, then I

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1 will stop questioning this witness.

2 MR. RICH: I'm not here to engage in acute  
3 lawyer argumentation with Mr. Schaeffer. Our position  
4 as to it is quite plain, as I think this witness's is.  
5 But he's creating a false dialogue and a false  
6 argument with this witness, which is not her  
7 testimony.

8 MR. SCHAEFFER: Well, now I'm very simple  
9 minded. I thought when there's a contract provision  
10 that says what it is and it's agreed to be  
11 enforceable, then it's enforced. And if this says  
12 that they can't -- nobody can consider the rates and  
13 the parties will submit the rates to the arbitration,  
14 that that's something that's contractually enforced.

15 MR. RICH: I think we're lapsing into Mr.  
16 Schaeffer's legal argument now for closing arguments  
17 as to what it means. And I'm happy to join issue with  
18 him whenever the Panel would like, but that's not what  
19 this witness is here today for.

20 MR. SCHAEFFER: Then I don't understand  
21 the point of this witness' testimony that this was  
22 mere boilerplate.

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1 MR. RICH: I think she's testified to her  
2 understanding.

3 MR. SCHAEFFER: Well, let me -- I'm just  
4 about finished with the witness anyway. Let me ask  
5 one question.

6 JUDGE GULIN: Are you withdrawing the  
7 question?

8 MR. SCHAEFFER: I'll withdraw the  
9 question.

10 CHAIRPERSON GRIFFITH: Thank you.

11 BY MR. SCHAEFFER:

12 Q I'm going to show you page 175 of Black's  
13 Law Dictionary.

14 (Laughter.)

15 A Is it going to be precedential per chance?

16 Q You think it's amusing?

17 A I haven't looked at Black's for a while.  
18 I don't think it's amusing.

19 Q Well, maybe you should.

20 A It wasn't in law school.

21 Q I would ask that this document, Black's  
22 Law Dictionary, page 175, be placed before the witness

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1 and marked as Exhibit -- I think it's 32.

2 MR. RICH: Your Honors, I move to strike  
3 another gratuitous statement by Mr. Schaeffer that  
4 this witness should, in apparently her spare time,  
5 take a look at Black's Law Dictionary. I think that  
6 was another gratuitous comment from counsel.

7 MR. SCHAEFFER: I think it was --

8 CHAIRPERSON GRIFFITH: Stricken from the  
9 record.

10 MR. RICH: Thank you.

11 CHAIRPERSON GRIFFITH: ASCAP Hearing  
12 Exhibit 32X. ASCAP 32X.

13 (Whereupon, the above-mentioned  
14 document was marked as ASCAP  
15 Exhibit 32X for  
16 identification.)

17 BY MR. SCHAEFFER:

18 Q Would you read the section on boilerplate?

19 A I shall. "Language which is used" --

20 Q Read it to yourself.

21 A Oh, okay. I've read it.

22 Q Do you agree with it?

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1           A       It seems like a clear definition of  
2 boilerplate.

3           MR. SCHAEFFER: I offer it in evidence.

4           CHAIRPERSON GRIFFITH: Any objection?

5           MR. RICH: No objection.

6           CHAIRPERSON GRIFFITH: It will be received  
7 without objection.

8                               (Whereupon, the above-mentioned  
9 document, previously marked as  
10 ASCAP Hearing Exhibit 32X for  
11 identification, was received in  
12 evidence.)

13           BY MR. SCHAEFFER:

14           Q       Finally, when you signed the 1987 license  
15 agreement and -- I'm sorry, the 1992 license agreement  
16 --

17           A       Right.

18           Q       -- and was involved -- and reviewed, to  
19 the extent you did, the 1987 license, did you have any  
20 reservations or any private understandings that 3(b)  
21 did not mean what it said, namely that the rates  
22 agreed upon would not be submitted by the parties to

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1 a CARP or a CRT?

2 MR. RICH: Objection.

3 CHAIRPERSON GRIFFITH: What basis?

4 MR. RICH: The document speaks for itself  
5 as to what it says, not counsel's characterization of  
6 what it says.

7 MR. SCHAEFFER: I'm asking for her  
8 understanding.

9 CHAIRPERSON GRIFFITH: Well, just a  
10 moment.

11 JUDGE DREYFUS: I'm sorry, the objection  
12 is that --

13 MR. RICH: He said that it will not --

14 JUDGE DREYFUS: -- it mischaracterized the  
15 specific words or paragraph out of the agreement?

16 MR. RICH: More than the words, the  
17 purport. He said shall not be submitted to this  
18 Tribunal. I don't see any words saying it shall not  
19 be submitted to any Tribunal.

20 MR. SCHAEFFER: Okay, I'll accept that,  
21 Mr. Rich, on reading.

22 BY MR. SCHAEFFER:

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1           Q     Did you have some reservation that,  
2     notwithstanding paragraph 3(b) of the two licenses,  
3     which are for this purpose identical, saying that the  
4     license fee for the respective license will have no  
5     precedential value in any proceeding before the  
6     Copyright Tribunal, court proceeding or other  
7     proceeding between the parties, did you have a  
8     reservation as to whether or not that was something  
9     that would be honored by your clients?

10          A     I don't have any reservations about this  
11     provision. I don't know, Mr. Schaeffer. It's a  
12     question of how you interpret it.

13          Q     Well, what interpretation of this  
14     provision justifies in your view the submission of the  
15     license fees in this proceeding to this CARP?

16          A     This provision, as you've said and pointed  
17     out numerous times, and I've thought about it a lot  
18     since you've emphasized it so much, says that it has  
19     no precedential value in any future negotiation,  
20     proceeding before the CRT, court proceeding or other  
21     proceeding.

22                     My sense is, when it says it has no

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1 precedential value, is what it means is that it  
2 doesn't bar ASCAP, it doesn't bar PBS or other parties  
3 from making arguments that may not be consonant with  
4 what's contained in this document.

5 But, you know, I will also submit to you  
6 that, irrespective of what this provision said, in all  
7 the negotiations, this says it won't have precedential  
8 value in the future negotiations. It always had value  
9 in future negotiations.

10 ASCAP, PBS began negotiations. Through  
11 all the years that this provision was in these  
12 agreements, from the place they had ended the last  
13 negotiation.

14 Q Is it your opinion that in paragraph eight  
15 of these agreements there's been a valid waiver of  
16 that provision even though it wasn't in writing?

17 MR. RICH: Object to mischaracterization  
18 of the purport of her testimony.

19 CHAIRPERSON GRIFFITH: The objection is  
20 sustained.

21 Do you want to rephrase it?

22 MR. SCHAEFFER: No, I don't think so. I

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1 think I'll stop right now.

2 CHAIRPERSON GRIFFITH: All right.

3 Mr. Kleinberg, do you have any questions,  
4 sir?

5 MR. KLEINBERG: I just have one or two  
6 questions.

7 CHAIRPERSON GRIFFITH: All right.

8 CROSS EXAMINATION

9 BY MR. KLEINBERG:

10 Q Ms. Jameson, Mr. Rich asked you to  
11 identify PBS Exhibit 30X, which I think --

12 A Right.

13 Q -- you indicated was the minutes of a  
14 meeting with BMI representatives and public  
15 broadcasters from July 9, 1992?

16 A Yes. I don't know where my copy is. Yes.

17 Q I just want you -- could you tell the  
18 Panel who Tom Gherardi is? He's listed as one of the  
19 attendees.

20 A Right. Tom Gherardi, many, many years  
21 ago, is -- well, in this particular negotiation, he  
22 was outside counsel to the Corporation for Public

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1 Broadcasting.

2 Q Okay, and my last question is, do I  
3 understand correctly that you said you had reviewed  
4 this document and were satisfied that it was accurate  
5 in terms of the rendition of the things that were said  
6 during this particular meeting?

7 A I know I -- it was given to me at the time  
8 it was prepared and I made no changes to it. And I've  
9 reviewed it. I used it as well to refresh my  
10 recollection.

11 Q And that includes the statement or items  
12 in there attributed to you?

13 A Yes. I think it's a fair, yeah,  
14 characterization of what I said.

15 MR. KLEINBERG: No further questions.

16 CHAIRPERSON GRIFFITH: All right, any  
17 redirect?

18 MR. RICH: Let me just have a moment,  
19 please.

20 We have no further questions.

21 CHAIRPERSON GRIFFITH: Judge Dreyfus has  
22 one question.

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1 JUDGE DREYFUS: Yes, with respect to PB-  
2 30X again.

3 THE WITNESS: Yes, sir.

4 JUDGE DREYFUS: This document, as we  
5 understand it, was passed around and some of the  
6 items, for example, on page five in the middle have a  
7 bracket that's "can someone elaborate, question mark."

8 THE WITNESS: Right.

9 JUDGE DREYFUS: I guess seeking more  
10 information to put in this document.

11 So the question is, was there another  
12 iteration of this document, a later iteration of this  
13 document that you know of?

14 THE WITNESS: My sense is there isn't. I  
15 think we searched the files pretty thoroughly with  
16 respect to preparing --

17 JUDGE DREYFUS: And there is none?

18 THE WITNESS: There is not.

19 I mean, this was Louise's capturing of her  
20 own written notes and I suspect that she just didn't  
21 quite understand what Mr. Miles was trying to say at  
22 that point. But I think we were lucky to get this,

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1 frankly.

2 JUDGE DREYFUS: Okay.

3 CHAIRPERSON GRIFFITH: May this witness be  
4 excused?

5 MR. SCHAEFFER: Yes.

6 CHAIRPERSON GRIFFITH: Ms. Jameson, you  
7 may step down now. Thank you very, very much. You're  
8 free to go.

9 THE WITNESS: Thank you.

10 (The witness was excused.)

11 CHAIRPERSON GRIFFITH: Before anyone else  
12 leaves, we want a -- two gentlemen here from out of  
13 town. Can we finish tomorrow definitely?

14 MR. SCHAEFFER: I'm going to try my best  
15 and I'll do everything I can.

16 CHAIRPERSON GRIFFITH: How about would you  
17 be willing to go late to finish tomorrow?

18 MR. SCHAEFFER: Yes, absolutely,  
19 absolutely.

20 MR. RICH: We surely would.

21 CHAIRPERSON GRIFFITH: Because they want  
22 to check out of -- you know, check out of the hotel

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1 and everything in the morning.

2 MR. SCHAEFFER: Absolutely.

3 CHAIRPERSON GRIFFITH: So let's put it  
4 this way.

5 MR. SCHAEFFER: And have an evening  
6 session.

7 CHAIRPERSON GRIFFITH: If necessary, we  
8 will go late and we will finish tomorrow.

9 MR. SCHAEFFER: That will be fine.

10 MR. RICH: Yes, wonderful.

11 CHAIRPERSON GRIFFITH: Good.

12 MR. SCHAEFFER: How long have you got on  
13 direct?

14 MR. RICH: I guess an hour and a half.

15 MR. SCHAEFFER: Okay. Then we shouldn't  
16 have a problem.

17 CHAIRPERSON GRIFFITH: All right, fine.

18 Have a pleasant evening. We'll see you  
19 tomorrow morning at 9:30.

20 Thank you.

21 (Whereupon, the proceedings were adjourned  
22 at 3:47 p.m..)

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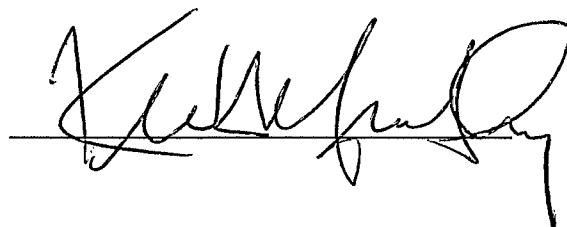
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